

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1207

B
PAS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

vs.

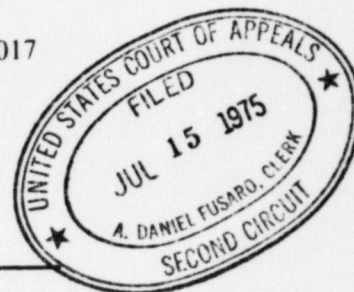
MARCE BELL,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

APPENDIX FOR DEFENDANT-APPELLANT

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WITNESSES

| | |
|--------------------|-----|
| William Frawley: | |
| Direct | 12a |
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DOCKET ENTRIES

1a

THE UNITED STATES

For U. S.:

vs.

Jeremy G. Epstein, AUSA

MARCE BELL

791-1937

For Defendant:

Goldman & Hafetz

60 E. 42nd St, NYC 682-8300

| ABSTRACT OF COSTS | AMOUNT | CASH RECEIVED AND DISBURSED | | | |
|-----------------------------------|--------|-----------------------------|------|----------|-----------|
| | | DATE | NAME | RECEIVED | DISBURSED |
| (12) | | | | | |
| Fine, | | | | | |
| Clerk, | | | | | |
| Marshal, | | | | | |
| Attorney, | | | | | |
| Commissioner's Court, | | | | | |
| Witnesses, | | | | | |
| 18:1202(a) Possess. of a firearm. | | | | | |
| (One Count) | | | | | |

| DATE | PROCEEDINGS |
|----------|---|
| 4-14-74 | Filed indictment. |
| 4-25-74 | Deft. (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed by Mag. continued. (\$10,000. P.R.B. secured by \$1500 cash. Case assigned to Judge Bonsal for all purposes. Tyler, J. |
| 12/4/74 | Filed notice of appearance by atty. Frederick Hafetz. |
| 12/17/74 | Filed deft. notice of motion re: suppression, etc. |

| | PROCEEDINGS | CLERK'S FEE | |
|----------|--|---------------------------------------|------|
| | | PLAINTIFF | DEFT |
| 03-24-75 | ✓ Filed Govt.'s requests to charge. | | |
| 03-24-75 | ✓ Filed Govt.'s memo. of law in opposition to deft.'s motion to suppress | | |
| 03-25-75 | ✓ Filed waiver of trial by jury. approved Bonsal, J. | | |
| 03-25-75 | ✓ Trial begun and concluded before Judge Bonsal. Court finds deft. guilty. Pre-sentence report ordered. 5-12-75 set for sentence. Bail on Bonsal, J. | | |
| 05-19-75 | ✓ Filed personal recognizance bond pending appeal in the sum of \$10,000 secured by \$1,500. cash. | | |
| 05-19-75 | ✓ Filed JUDGMENT (atty. present) ***** deft. is committed to custody of the Atty. Gen'l. for imprisonment for a period of (2) YEARS. Bail pending appeal fixed at \$10,000. Personal recognizance Bond to be cosigned by deft.'s wife and to be posted 5-19-75. Bonsal, J. issued all copies | | |
| 05-28-75 | ✓ Filed deft. Marce Bell's notice of appeal from judgment of 5-19-75. Mailed notices. | | |
| 6-6-75 | Filed transcript of proceedings dated 3/25/75 | | |
| 6-6-75 | Filed transcript of proceedings dated 5/19/75 | | |
| | | By <u>[Signature]</u> Deputy Clerk | |
| | | B | |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - :

MARCE BELL, :

Defendant. :

- - - - - x

INDICTMENT

74 Cr.

The Grand Jury charges:

On or about the 7th day of October, 1974, in the Southern District of New York, MARCE BELL, the defendant, having been convicted in the Supreme Court, New York County, of manslaughter, a crime punishable by imprisonment for a term exceeding one year, knowingly did possess, receive or transport in commerce or affecting commerce a firearm, to wit, a .38 calibre IMA revolver, serial number 013196.

(Title 18, United States Code, App. § 1202(a).)

FOREMAN

PAUL J. CURRAN
United States Attorney

TRANSCRIPT OF PROCEEDINGS DATED MARCH 25, 1975
(Filed June 6, 1975)

4a

1

rgpd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

-against-

MARCE BELL,

Defendant.

-----X

74 Cr. 1073

Before:

HON. DUDLEY B. BONSAI,

District Judge

New York, New York
March 25, 1975
10:00 a.m.

APPEARANCES:

PAUL J. CURRAN, Esq.,

United States Attorney for the
Southern District of New York

-- By: JEREMY EPSTEIN, Esq.,
Assistant United States Attorney

FREDRICK HAFETZ, Esq.,

Attorney for Defendant

rgpd

2

(In the robing room.)

THE COURT: The defendant isn't here yet I understand.

MR. HAFETZ: No, I expect him momentarily. I called his house and I am sure he is on his way.

THE COURT: This is partly the motion to suppress and partly the trial and you are willing to proceed on that basis non-jury?

MR. HAFETZ: That's correct.

THE COURT: And he is going to waive the jury?

MR. HAFETZ: That's right.

MR. EPSTEIN: I prepared jury waivers and he can execute them when he gets here.

THE COURT: You have your witnesses?

MR. EPSTEIN: Yes. Mr. Kingham will be my last witness. He is in his office and he is available on a telephone call notice.

THE COURT: As soon as your client gets here we will start.

MR. EPSTEIN: I understand it is the understanding that we will be able to have the suppression hearing in conjunction with the trial?

MR. HAFETZ: There will be some evidence admissible at the suppression hearing that will not be admitted at

1 rgpd

2 trial.

3 THE COURT: I can rule on that. All right,
4 thank you.

5 (In open court.)

6 THE CLERK: United States of America versus
7 Marce Bell. Both sides ready?

8 MR. EPSTEIN: The Government is ready.

9 MR. HAFETZ: The defendant is ready.

10 MR. EPSTEIN: For the record, your Honor, I think
11 the defendant is executing the waiver of the jury form and
12 I will hand it up to you as soon as it has been executed.

13 THE COURT: Mr. Bell, how old are you, sir?

14 THE DEFENDANT: Thirty-six, sir.

15 THE COURT: I have been presented with this
16 waiver of a trial by jury. Did you sign this, sir?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that you have an
19 absolute right to a jury at this trial, a jury of 12 citizens
20 sitting in that box, sir?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: If you were tried by a jury they
23 would all have to agree before you could be found guilty;
24 there would have to be a unanimous verdict, do you under-
25 stand that, sir?

1 rgpd

2 THE DEFENDANT: Yes.

3 THE COURT: By so doing you are leaving it up
4 to me to decide on your guilt or innocence, do you under-
5 stand?

6 THE DEFENDANT: Yes.

7 THE COURT: Did you talk to Mr. Hafetz about
8 this?

9 THE DEFENDANT: Yes.

10 THE COURT: You fully understand your rights?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right, I will accept the waiver,
13 then.

14 Gentlemen, I have read the indictment. I don't
15 think I need opening statements, unless either side wants to
16 give one, but I don't feel I need it because I feel I know
17 what the charge is.

18 MR. EPSTEIN: I am perfectly willing, your Honor.

19 MR. HAFETZ: Your Honor, I thought it might be
20 helpful just briefly to make one and also I think it may be
21 significant from the defendant's standpoint. There is one
22 point that I believe should be made in an opening, if the
23 Court might permit me.

24 THE COURT: Sure.

25 MR. HAFETZ: Your Honor, as agreed with the

1 rgpd

2 Government, subject to the Court's consent both the motion
3 to suppress and the trial of the indictment will be
4 consolidated.

5 THE COURT: Right.

6 MR. HAFETZ: I will address my opening to the
7 indictment, not to the motion to suppress. I do not
8 know what evidence will be developed at that time, but with
9 regard to the charge in the indictment, Section 1202(a)
10 United States Code appendix, I would submit that based on
11 the evidence I believe the Government will adduce during the
12 trial, that will be insufficient as a matter of law to make
13 out the respective crimes charged. The indictment charges
14 three crimes, in effect, disjunctive methods of violating
15 a statute. One is transporting of a firearm, a second is
16 receipt of a firearm and third is possession of a firearm.
17 I understand that these are the three possible ways in which
18 the statute may be violated.

19 In regard to each there must be a showing of an
20 interstate travel nexus, Interstate Commerce nexus as
21 required under the Supreme Court decision in United States
22 against Bass. The quantum of proof requisite for conviction
23 as to each, the quantum of interstate nexus requisite of
24 conviction of each varies and the cases under Bass have
25 recognized the distinction.

rgpd

1
2 Addressing myself to the three disjunctive
3 parts of the statute, I believe the Government's proof will
4 fall short on each. With regard to the transportation of
5 the firearm, I believe the evidence will show essentially
6 that the defendant on the date alleged in the indictment
7 did possess a firearm. The evidence will further show that
8 the defendant was previously convicted of a felony.

9 In regard to the interstate nexus required as to
10 this part of the statute, transporting a firearm, I believe
11 the Government will not show that at the time charged in the
12 indictment the gun was being transported in interstate
13 commerce. Rather, the only evidence that it will have, I
14 believe it will show of interstate transportation of the
15 gun, will be that the gun had previously traveled or had
16 been brought from the State of Virginia to New York, and
17 this will be established by an admission by the defendant.

18 I submit that the cases are clear that an essential
19 element of the crime cannot be established by the defendant's
20 admission alone.

21 THE COURT: What was the name of that case you
22 referred to?

23 MR. HAFETZ: United States against Henderson,
24 467F 2d 904 and also on the general principle that an
25 essential element of the crime cannot be established by the

1 rgpd

7

2 defendant's own admission, Smith against United States,
3 348 U.S. 147, a 1954 Supreme Court decision.

4 THE COURT: Thank you, I will have that in mind.

5 MR. HAFETZ: In regard to the second aspect of
6 the statute, the receipt element, the proof will establish
7 the only proof as to the receipt of the gun will be
8 defendant's own admission --

9 THE COURT: This is in the disjunctive. In the
10 statute it says receives, possesses or transports.

11 MR. HAFETZ: Yes. It is my understanding if
12 the Government proved any of those three it would be
13 sufficient.

14 THE COURT: That is right. That is what I was
15 wondering about.

16 MR. HAFETZ: On the receipt disjunctive aspect
17 of the statute, the only proof as to the receipt of the
18 gun by the defendant is his receipt of it in the State of
19 Virginia. Accordingly there is no venue in the District
20 of New York for prosecution of a crime of receipt.

21 Additionally, at the time of receipt --

22 THE COURT: I am just wondering, doesn't the
23 statute say if a person receives, possesses or transports --
24 you know, wouldn't it mean if he possessed it in New York
25 that that would be sufficient on the venue point?

1 rgpd

2 MR. HAFETZ: I am coming to the possession aspect,
3 your Honor.

4 On the receipt, as I understand it there will not
5 be sufficient evidence there for the Government to establish
6 venue.

7 With regard to the suppression element, the Bass
8 case itself states that there is a greater showing in
9 interstate commerce required where possession is charged as
10 opposed to receipt. Cases construing that also state that
11 there must be a direct showing of interstate commerce in
12 a charge of possession as opposed to receipt. I submit that
13 at the time charged in the indictment the evidence will show
14 the defendant was in possession of the gun, but there is no
15 direct relationship to interstate commerce.

16 The words in Bass were, I believe, that the gun was
17 moving in interstate commerce or affected interstate commerce
18 at that time. I believe the Government will not show
19 accordingly and it will be our submission that the Govern-
20 ment will fail to show the three disjunctive methods of
21 violating the statute.

22 THE COURT: Thank you very much and I will
23 consider that, of course.

24 All right, Mr. Epstein, will you call your first
25 witness.

1 rgpd

Frawley - Direct

9

2 MR. EPSTEIN: Yes, the Government calls William
3 Frawley.

4 W I L L I A M F R A W L E Y , was sworn.

5 MR. HAFETZ: Before we begin, the defendant's
6 wife is sitting in court. I am not expecting to call her
7 as a witness although there is some possibility that she
8 may be, so I think I am going to have to ask her to leave.

9 MR. EPSTEIN: There is no objection to her stay-
10 ing.

11 THE COURT: All right, thank you.

12 DIRECT EXAMINATION

13 BY MR. EPSTEIN:

14 Q Mr. Frawley, how are you employed?

15 A I am a police officer with the New York City
16 Police Department. I am assigned to the New York Drug
17 Enforcement Task Force.

18 Q How long have you been employed by the police
19 department?

20 A Eight and a half years.

21 Q Now, Mr. Frawley, I direct your attention to
22 October 7, 1974. Were you on duty on that day?

23 A Yes, sir.

24 Q Did there come a time when you appeared in this
25 courthouse and swore to an affidavit for a search warrant?

1 rgpd

Frawley - Direct

10

2 A Yes, sir.

3 Q What premises did you seek the warrant for?

4 A I seeked the search warrant -- I made an appli-
5 cation for a search warrant for the residence at 1700
6 Harrison Avenue, Apartment 253.

7 Q Whose apartment was that?

8 A Mr. Bell's.

9 Q Do you see Mr. Bell in court today?

10 A Yes, sir.

11 Q Could you point him out, please?

12 A He is sitting at the table, sir.

13 MR. EPSTEIN: Your Honor, may the record reflect
14 identification of the defendant?

15 THE COURT: Yes.

16 Q Officer Frawley, was a search warrant issued on
17 the basis of the affidavit you swore to?

18 A Yes, sir.

19 Q I show you what has previously been marked
20 Government's Exhibit 1 for identification, a document
21 consisting of three pages, and I ask if you can identify
22 it.

23 A Yes, sir.

24 Q What is it, please?

25 A This is my search warrant application and the

1 rgpd Frawley - Direct 11

2 search warrant.

3 Q Government's Exhibit 1, then, contains both your

4 affidavit and the search warrant itself?

5 A Yes, sir.

6 MR. EPSTEIN: I offer Exhibit 1.

7 THE COURT: Show it to counsel, please.

8 MR. HAFETZ: No objection.

9 THE COURT: It will be received.

10 (Government's Exhibit 1 received in evidence.)

11 Q Officer Frawley, what if anything did you do after

12 the search warrant was issued?

13 A After the search warrant was issued I returned to

14 my office and from my office myself and other members of the

15 New York Drug Enforcement Task Force proceeded to the

16 vicinity of 1700 Harrison Avenue, the Bronx, and we took

17 up surveillance positions in an attempt to execute the

18 search warrant.

19 Q Approximately what time did you place the apartment

20 under surveillance?

21 A If I remember correctly I believe it was around

22 7:00 p.m.

23 THE COURT: 7:00 in the evening?

24 THE WITNESS: 7:00 p.m., your Honor.

25 Q Directing your attention to approximately 8:00

1 rgpd

Frawley - Direct

12

2 o'clock on that evening, what if anything happened at that
3 time?

4 A Yes, sir. At that time we observed Mr. Bell and
5 a female we did not know at that time exit --

6 THE COURT: Had you seen Mr. Bell before?

7 THE WITNESS: I knew Mr. Bell by photographs.
8 I had seen him on the street, but never close, your Honor.

9 THE COURT: Where did you see Mr. Bell?

10 THE WITNESS: I have seen Mr. Bell in the vicinity
11 of 127th Street and 7th Avenue, Manhattan.

12 Q So there came a time when Mr. Bell and a woman
13 left 1700 Harrison Avenue. What if anything happened at
14 that point?

15 A At that point we saw them exit the building and we
16 had previously observed Mr. Bell's car parked opposite 1700
17 Harrison Avenue on the street. At that time Mr. Bell and
18 the female approached the car and we did not know at the
19 time that Mr. Bell's vehicle had a flat tire and we noticed
20 them walking around and then Mr. Bell opened the trunk and
21 he started to rummage in the trunk, so there was a decision
22 at that time to execute the search warrant, so we started to
23 approach Mr. Bell.

24 Q Excuse me, Officer Frawley. By we, who are you
25 referring to?

rgpd

Frawley - Direct

13

1
2 A Myself and other members of the task force.
3 Would you like their names?

4 THE COURT: How many were there?

5 THE WITNESS: I would say approximately seven of
6 us at the time.

7 THE COURT: Do you remember some of their names?

8 THE WITNESS: Oh, yes, sir.

9 THE COURT: Okay. Can you give us a couple?
10 I don't think you need to give us all seven. Who else was
11 with you?

12 THE WITNESS: Lieutenant Joseph Greeley, New York
13 City Police Department; Sergeant John Forkin, New York City
14 Police Department; Special Agent Francis Dunham, DEA;
15 Investigator Nolan Pazin, New York State Police; Police
16 Officer John Heckman; and, Police Officer Michael Latimer;
17 Detective Morris Balmer, New York City Police Department
18 and I believe also Special Agent Dennis Checkoway, D.E.A.

19 Q Officer Frawley, you were at the point when
20 Mr. Frawley was walking around his car examining his tire.
21 What happened after that?

22 A At that time, through the use of two-way radios
23 in our vehicles we stated that we would approach Mr. Bell
24 and inform him of our search warrant.

25 THE COURT: Do you remember what kind of a car

1 rcpd

Frawley - Direct

14

2 this was?

3 THE WITNESS: It was a late model -- I believe,
4 I am not positive, your Honor, but I think it was a Buick.

5 THE COURT: Do you remember the color or anything
6 like that?

7 THE WITNESS: It was a brownish.

8 THE COURT: A brownish color?

9 THE WITNESS: Yes.

10 THE COURT: Go ahead.

11 Q Continue, please.

12 THE WITNESS: Excuse me, your Honor. It had
13 Jersey plates on it.

14 Q Continue, please, Officer Frawley.

15 A At that time I left my surveillance position.
16 I pulled my vehicle to the intersection of 176th Street
17 and Harrison Avenue at the corner. Now, Mr. Bell was
18 approximately 100 feet ahead of me to the left side of the
19 street. He was doing some work at the car, at the rear
20 of the car.

21 I exited my vehicle and when I exited I was in
22 the street, so I walked straight down the street towards
23 Mr. Bell.

24 Now, just before I reached Mr. Bell Investigator
25 Pazin confronted Mr. Bell and Mr. Bell was standing in the

1 rcpd

Frawley - Direc

15

2 trunk of the vehicle, the trunk was open, and Mr. -- I did
3 not here what Mr. Pazin stated, but I noticed Mr. Pazin put
4 his hands on Mr. Bell around his waist over his jacket.

5 The next thing I know I heard Mr. Pazin say he
6 has a gun. Mr. Pazin reached under Mr. Bell's jacket
7 and removed from what it looked like his waist a revolver.
8 Now, Mr. Bell then -- excuse me, Investigator Pazin took
9 the gun, put it into his waist of his trousers and then
10 took Mr. Bell -- both of us took Mr. Bell out of the trunk
11 of the car and I placed Mr. Bell under arrest for the
12 possession of the gun.

13 Q Officer Frawley, I show you what has previously
14 been marked Government's Exhibit 2 for identification and I
15 ask if you can identify it.

16 A Yes, sir.

17 Q What is it, please?

18 A This is the revolver that was removed from
19 Mr. Bell's waist. It is an INA revolver, serial number
20 013196. It carries five rounds. It was loaded with five
21 rounds at the time of his arrest.

22 Q I show you what has previously been marked
23 Government's Exhibit 2A and I ask you if you can identify
24 that.

25 A Yes, sir. These are three .38 caliber shells that

1 rgpd

Frawley - Direct

16

2 were within the revolver.

3 Q Those are three of the five shells that were
4 within the revolver, is that correct?

5 A Yes, sir.

6 Q What, if you know, happened to the other two
7 shells?

8 A The other two shells were expended at the New York
9 City Police Department ballistics lab where the gun was
10 tested by the New York City Police Department to see if it
11 was operable.

12 MR. EPSTEIN: Your Honor, I offer Government's
13 Exhibits 2 and 2A.

14 MR. HAFETZ: No objection.

15 THE COURT: Mr. Hafetz, is there any dispute here
16 that this handgun is a handgun within the statute?

17 MR. HAFETZ: No dispute.

18 THE COURT: There is no dispute about that. I
19 wouldn't think so. Okay.

20 (Government's Exhibits 2 and 2A received in
21 evidence.)

22 Q Officer Frawley, what if anything happened after
23 Mr. Bell was placed under arrest?

24 A When Mr. Bell was placed under arrest he was hand-
25 cuffed and we informed him of his rights and we stated at

rgpd

Frawley - Direct

17

that time --

THE COURT: When did that happen?

THE WITNESS: It happened in the street. I started to recite him his rights and I informed him that we had a search warrant for his apartment.

Now, Mr. Bell during that time was a little upset and myself and Investigator Pazin brought Mr. Bell back up to his apartment.

THE COURT: Who had the search warrant? Did you have the search warrant?

THE WITNESS: I had the search warrant in my possession.

THE COURT: So that at the time you are describing what Mr. Pazin did you had the search warrant and you were behind him, I take it?

THE WITNESS: Yes, sir.

Q Now, Officer Frawley, what if anything did Mr. Bell say after you advised him of his rights?

A Immediately after I advised him of his rights Mr. Bell did not say very much. A little inflammatory statements, but he was very upset at the time.

After proceeding back to his apartment with the female he calmed down and we advised him of his rights and he was read the search warrant and the search warrant was

1 rgpd

Frawley - Direct

18

2 given to him.

3 THE COURT: Do I understand that when he went
4 back to the apartment with you you read him the statement
5 of his rights again?

6 THE WITNESS: Yes, sir.

7 THE COURT: How did you get into the apartment?

8 THE WITNESS: The use of the keys into the
9 apartment.

10 THE COURT: Did he give you the keys to open the
11 apartment?

12 THE WITNESS: No, I believe it was the female who
13 opened the apartment for us.

14 Q What if anything did Mr. Bell say in the apartment?

15 A Well, statements were made in the apartment by
16 Mr. Bell as to the fact that we were searching the apartment
17 for narcotics and Mr. Bell stated that he did not sell
18 narcotics, he only sold narcotics paraphernalia -- excuse
19 me, he made his living selling narcotics paraphernalia and
20 running numbers.

21 Now, when we questioned him to the fact regarding
22 the gun Mr. Bell stated that he bought the gun in Virginia.

23 Q Was that the extent of his statements at that
24 time?

25 A He made a statement that he bought the gun in

- 1 rgpd Frawley - Direct 19
- 2 Virginia a couple of years ago, I believe.
- 3 Q Now, Officer Frawley, I direct your attention
- 4 to the following day, October 8, 1974. Were you on duty
- 5 on that day?
- 6 A Yes, sir.
- 7 Q Did there come a time when you brought Mr. Bell to
- 8 this courthouse for arraignment?
- 9 A Yes, there was.
- 10 Q Now, prior to arraignment was he taken to the
- 11 United States Attorney's office for an interview?
- 12 A Yes, he was.
- 13 Q Was he interviewed by Assistant United States
- 14 Attorney T. Barry Kingham?
- 15 A Yes, he was interviewed by Mr. Kingham, yes.
- 16 Q What if anything was Mr. Bell told at the outset
- 17 of that interview?
- 18 A At the beginning of the interview Mr. Bell was
- 19 advised of his rights by Mr. Kingham and a series of ques-
- 20 tions were asked of Mr. Bell. Mr. Bell answered these
- 21 questions of his own volition.
- 22 Q Was Mr. Bell at any time during this interview
- 23 asked about his prior criminal record?
- 24 A Yes, he was.
- 25 Q What if anything did he respond?

1 rgpd

Frawley - Direct

20

2 A At the time I had a record of his prior criminal
3 record and Mr. Kingham went over it and Mr. Bell acknowledged
4 the -- admitted to the arrest and acknowledged it.

5 Q Specifically he acknowledged that he had been
6 convicted of manslaughter, is that correct?

7 A Yes, sir.

8 MR. EPSTEIN: Your Honor, at this time I offer
9 Government's Exhibit 3, which is a certified copy of
10 Mr. Bell's conviction.

11 THE COURT: Show it to counsel, will you?

12 MR. HAFETZ: No objection to the document intro-
13 duced showing prior conviction for the crime of manslaughter.

14 MR. EPSTEIN: Your Honor, I should note for the
15 record that the certification that is attached to the
16 document indicates that Mr. Bell was accused of the crime
17 of murder second degree. However, the indictment and the
18 endorsements indicate that he pleaded guilty to and was
19 convicted of manslaughter.

20 THE COURT: Thank you.

21 (Government's Exhibit 3 received in evidence.)

22 MR. EPSTEIN: I have no further questions.

23 THE COURT: How about 3500 material, Mr. Hafetz?

24 MR. HAFETZ: That has been turned over to me.

25 THE COURT: Are you prepared to proceed?

1 rgpd

Frawley - Cross

21

2 MR. HAFETZ: Yes. May I just have one moment?

3 THE COURT: Sure.

4 (Pause.)

5 MR. HAFETZ: Your Honor, with regard to the search
6 warrant that was offered into evidence, I take it that only
7 goes to the suppression hearing, of course, and not the
8 indictment; is that correct?

9 THE COURT: Yes, I think that is correct.

10 CROSS-EXAMINATION

11 BY MR. HAFETZ:

12 Q Mr. Frawley, you stated that you obtained the
13 search warrant on October 7, 1974?

14 A That's correct, yes.

15 Q Did you personally obtain the warrant?

16 A I made the application for it, yes.

17 Q At what time was the application made?

18 A I came here early in the morning, started to
19 procees for it and I believe it wasn't signed until late
20 in the afternoon, I believe, approximately 4:30.

21 Q What did you do after you picked up the warrant
22 after it had been executed by a magistrate and then turned
23 over to you, what did you then do at that time?

24 A I then went back to my office at 201 Varrick Street.

25 Q At what time did you set out for the vicinity of

1 rgpd

Frawley - Cross

22

2 1700 Harrison Avenue?

3 A I am not certain about that, but I would say
4 approximately 6:00, 6:30, but I'm not certain.

5 THE COURT: How did you get to the vicinity of
6 Harrison Avenue, sir?

7 THE WITNESS: By vehicles, the use of Government
8 vehicles.

9 THE COURT: This was the group that you were
10 describing that went up there?

11 THE WITNESS: Yes.

12 Q How many vehicles proceeded up there?

13 THE COURT: If you recall.

14 Q If you recall.

15 A A minimum of at least four.

16 Q If you recall.

17 A A minimum of at least four.

18 Q How many officers or agents were in the four
19 vehicles, if you recall?

20 A As I stated before I believe there were at least
21 seven of us.

22 Q You say at least seven. Could there have been
23 more?

24 A Yes.

25 Q Give us the range of your best recollection, from

1 rgpd

Frawley - Cross

23

2 seven to what number? Could there have been as many as
3 10?

4 A Possibly, yes.

5 Q Again, what agencies were represented there?

6 A You have the agents from the Drug Enforcement
7 Administration, you had Investigator Nolan Pazin from the
8 New York State Police and you had officers from the New York
9 City Police Department.

10 Q I assume that each of these agents and officers
11 had guns?

12 A That's correct.

13 Q You arrived there at what time approximately?

14 A Approximately 7:00 p.m., I believe.

15 Q What did you do upon arrival?

16 A We set up in positions so we could observe --
17 certain units set up in position so they could observe the
18 front of the building; so that we could observe Mr. Bell's
19 vehicle and other units were set up in such a way that if
20 Mr. Bell's vehicle moved we could stop the vehicle at the
21 intersection of Tremont Avenue.

22 THE COURT: You knew at this time that this car
23 was Mr. Bell's car?

24 THE WITNESS: Yes, your Honor.

25 THE COURT: That was on the basis of the information

1 rgpd

Frawley - Cross

24

2 you had before, is that correct?

3 THE WITNESS: Through our investigation the plate
4 number came back for that vehicle.

5 Q Did you see the vehicle when you arrived in the
6 vicinity of his apartment house?

7 A After cruising the area, in a couple of minutes
8 we spotted it right away, yes, sir.

9 Q Where was it parked in relation to the entrance
10 of his house?

11 A Directly in front of his house across the street
12 from his residence.

13 Q Was there anyone in the car?

14 A There was nobody in the car.

15 Q After setting up in position, what did you do then,
16 Officer?

17 A We just sat and waited until we saw Mr. Bell come
18 out of the building.

19 Q You had a warrant for the apartment, did you not?

20 A That's correct.

21 Q Did anyone go up to execute the warrant?

22 A The decision was made at that time not to attempt
23 an entry to the apartment.

24 Q Why was that, Officer?

25 A Seeing that we were dealing with narcotics, the

1 rgpd

Frawley - Cross

25

2 feasibility of destroying narcotics. Under the guidelines
3 of the DEA we had to stay outside the premises and identif
4 ourselves before we can make an entry into the apartment.

5 THE COURT: You were concerned that if you had,
6 that the contraband might have been destroyed?

7 THE WITNESS: Yes.

8 THE COURT: And therefore you decided it better
9 to wait until the defendant came outside?

10 THE WITNESS: Yes, sir.

11 Q Had you made application to the magistrate for a
12 no-knock entry into the apartment?

13 A I believe there was an application made. I
14 believe it was granted.

15 Q Was or was not?

16 A I believe it was.

17 Q I show you Exhibit 1. Could you show me where
18 on that application for the search warrant and the warrant
19 itself there is an indication that no-knock authority was
20 applied for?

21 A Excuse me, I stand corrected. It does not state
22 no-knock.

23 Q So you never did apply for no-knock authority,
24 correct?

25 A No, we did not. We could not execute the no-knock

1 rgpd

Frawley - Cross

2 warrant because we did not receive permission from Washington
3 DEA headquarters to execute a no-knock.

4 Q Officer, your prime information as to who resided
5 in that apartment was what?

6 A Mr. Bell and a female.

7 Q Did you have any information that anyone else had
8 resided in that apartment other than he and his wife?

9 A No, we did not. Excuse me, we knew that at times
10 there were certain people that would frequent the residence
11 and possibly stay over.

12 Q After taking up the positions you took up how long
13 was it that you were outside before you saw the defendant
14 exit the building in question?

15 A Approximately an hour, I believe.

16 Q And would you describe what happened at that time.

17 A When we observed Mr. Bell exit the building?

18 Q That's correct.

19 A Mr. Bell exited the building and walked straight
20 to his car.

21 Q Let me just stop you for one minute. Was he with
22 his wife when he exited?

23 A Yes, he was.

24 Q Go ahead, sir.

25 A Mr. Bell and the female exited the building

rgpd

Frawley - Cross

27

1 together and walked directly to Mr. Bell's vehicle.

2 THE COURT: That is they walked across the
3 street as I understand it?

4 THE WITNESS: Yes, sir. They walked across the
5 street to Mr. Bell's vehicle.

6 A At that time we had observed him starting to walk
7 about the car looking at the left rear wheel. We did not
8 know that there was a flat on the vehicle at that time.
9 We observed Mr. Bell open the trunk.

10 THE COURT: We is a big term. And that's what
11 you observed?

12 THE WITNESS: Excuse me, I observed Mr. Bell
13 open the trunk of the vehicle, start rummaging around or
14 pushing items under the trunk and then I believe he took
15 out -- yes, he took out a tire and threw it on the sidewalk
16 and then that is when we realized apparently he had a flat
17 tire.

18 Q Where were you in relation to him and his car at
19 the time that he took out a tire from the trunk?

20 A Directly across the street from Mr. Bell's
21 residence, 1700 Harrison Avenue, there is a playground.
22 I was parked in the -- excuse me, not a playground, a school
23 yard. I was parked in the school yard looking down onto
24 Mr. Bell's vehicle and his residence.
25

1 rgpd

Frawley - Cross

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2 THE COURT: You say looking down, sir. What
3 do you mean by that? Is that an elevated playground?

4 THE WITNESS: Well, your Honor, on the Harrison
5 Avenue side there is a level where the kids were playing.
6 They could play basketball and other recreation games and
7 then you had stairs going up to where the school is with
8 another playground.

9 THE COURT: And you were up the stairs?

10 THE WITNESS: I was up on top in the school yard
11 looking down from my vehicle.

12 THE COURT: What is the lighting at this point,
13 was it dark?

14 THE WITNESS: It was getting dark, yes, sir.

15 THE COURT: It was getting dark?

16 THE WITNESS: It was dark, but with street
17 lights and everything you could see.

18 THE COURT: How far did you think you were from
19 the defendant's car?

20 THE WITNESS: I would have to say approximately
21 300 feet.

22 THE COURT: 100 yards?

23 THE WITNESS: Yes, sir.

24 Q Where were the other officers in relation to your-
25 self at that time?

rgpd

Frawley - Cross

29

1
2 A I knew we had -- I could observe one unit, one
3 car at the intersection of 176th Street and Harrison Avenue
4 pointing east on 176th Street and we had another unit I
5 could observe that was -- excuse me, I couldn't observe it,
6 but I knew that we had a unit at the intersection of
7 Harrison Avenue and Tremont Avenue, which is just north of
8 Mr. Bell's residence. We had another unit -- I am not
9 certain of the cross street, but by the school. They were
10 out of sight of the residence and the vehicle.

11 Q Were the agents all located in the same block as
12 Mr. Bell lived on at this time that you observed him fixing
13 the tire?

14 A Excuse me, the agents?

15 Q Agents and officers.

16 A Were they all in the same block?

17 Q Yes.

18 A No, they weren't.

19 Q Who was with you at the point you observed him
20 fixing the flat tire?

21 A At the point where -- originally I was with
22 Detective Balmer in our vehicle and then I was joined by
23 Lieutenant Greeley and Sergeant Forkin in their vehicle and
24 we were observing Mr. Bell.

25 Q So there were four of you at that location?

1 rgpd

Frawley - Cross

30

2 A At the time when we made the decision -- well,
3 when we ascertained the assumption that he was changing a
4 flat tire, yes, there were four.

5 THE COURT: Do I understand, then, that when you
6 made this observation you say you were some 300 feet away
7 sitting in a vehicle with these three other officers?

8 THE WITNESS: Yes, sir.

9 Q Were you in radio contact with the other officers
10 at this time?

11 A Yes, sir.

12 Q Were all of the agents there apprised of the fact
13 that the defendant Bell and his wife had exited the building?

14 A Yes, sir.

15 Q About how long did you observe the defendant Bell
16 at his car before approaching him?

17 A I would have to approximate it and I would say
18 approximately 10 minutes.

19 Q During this time did anyone go up to the apartment
20 with the search warrant to execute it?

21 A No.

22 Q You had made a decision to approach the defendant
23 first on the street before going up to the apartment?

24 A Yes, sir.

25 Q Did you have prior information that the defendant

1 rgpd

Frawley - Cross

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2 had a gun?

3 A Yes, sir.

4 Q Had the decision been made to search the defendant
5 for his gun at the point that he was going to be approached
6 on the street?

7 A Was there a decision made to see if he had a gun
8 in his possession?

9 Q That's right, at the point where he was going to
10 be approached on the street.

11 A No, there was no decision made like that.

12 Q What discussion had there been, if any, about the
13 defendant's gun and what action would be taken upon approach-
14 ing him in the street?

15 MR. HAFETZ: Objection, your Honor.

16 THE COURT: I will limit that and allow the
17 question was there any discussion about the gun at the time
18 that Pazin, I think, did what he did, did you discuss the
19 gun?

20 THE WITNESS: No, your Honor.

21 THE COURT: Is it Detective Pazin?

22 THE WITNESS: No, he is a State Police Officer
23 and investigator.

24 THE COURT: Was he with your group in the play-
25 ground or where was Pazin?

1 rgpd

Frawley - Cross

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2 THE WITNESS: He was in another vehicle. I don't
3 remember where he was.

4 THE COURT: He was in another vehicle and then
5 you observed Pazin approach the car, is that correct?

6 THE WITNESS: Well, when the decision was made to
7 approach the units came into the area and Investigator Pazin
8 was the first person to confront Mr. Pazin -- Mr. Bell,
9 excuse me.

10 THE COURT: All right.

11 Q Officer, let me see if I am clear on this. You
12 had heard the defendant carried a gun prior to that day, is
13 that correct?

14 A Yes, sir.

15 Q In fact in your affidavit you stated that as
16 recently as within the last couple of days you had heard
17 that he carried a gun, am I correct?

18 A That's correct.

19 Q And so you believed that he had a gun in his
20 possession on that date?

21 A We were cognizant of the fact that there was a
22 possibility.

23 Q You mean to say that knowing this none of the
24 officers discussed what action would be taken in regard to
25 the defendant --

rgpd

Frawley - Cross

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1 THE COURT: You don't need to argue with the
2 witness. I don't think he has to answer that.

3 Q Officer, again, was there any discussion about the
4 gun on that date prior to approaching the defendant?

5 MR. EPSTEIN: Asked and answered, your Honor.

6 THE COURT: He said he didn't have any and he
7 can't answer as to what others might have.

8 A To the best of my recollection I don't remember any
9 discussion regarding the gun.

10 Q Did you apply for permission to search the defendant
11 for a gun?

12 THE COURT: By did he apply do you mean he went
13 for the search warrant?

14 MR. HAFETZ: To search the defendant's person for
15 a gun.

16 A I do not remember making an application for a gun
17 in his possession, but we stated a gun in the search warrant
18 application.

19 Q Well, my question is did you apply for a search
20 warrant to search him for a gun?

21 A I would have to look at the search warrant again.

22 THE COURT: Show him the search warrant.

23 MR. EPSTEIN: We will stipulate that the search
24 warrant is for the premises, not the person.
25

1 rgpd

Frawley - Cross

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2 Q Before I ask that question, did you have reason
3 to believe that the defendant carried a gun prior to October
4 7?

5 A Yes, I did.

6 Q You thought your informant was reliable?

7 A Yes.

8 Q In fact, was he your informant? Had you dealt
9 with him in the past?

10 A No, he was not registered to me, but I knew the
11 informant.

12 Q And other agents vouched for his reliability?

13 A Yes.

14 Q And the informant indicated that as recent as
15 several days prior to October 7 the defendant carried a
16 gun, is that correct?

17 A I know that the informant informed us that he had
18 seen the gun sometime before, yes, a reasonable amount of
19 time, the search warrant application, yes.

20 Q In fact, the informant had said that he had seen
21 the defendant carrying a gun, is that correct?

22 A It first states in the application, yes.

23 THE COURT: Do you recall now without looking at
24 it whether it states that?

25 THE WITNESS: I know the informant has told me --

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rgpd

Frawley - Cross

35

he told me in the past that he did carry a gun, yes.

THE COURT: Okay.

Q How much prior to the application for the warrant did the informant make that statement that he had seen the defendant carrying the gun?

THE COURT: To the witness?

MR. HAFETZ: Yes.

THE COURT: Do you remember how long before this informant told you about this?

THE WITNESS: I believe it was a matter of four days, maybe three days. Excuse me, three days. I remember it now.

Q Officer, did you think that you had reasonable cause to believe that the defendant possessed a gun on October 7?

MR. EPSTEIN: Objection, your Honor.

THE COURT: I think I will sustain the objection to that. As I recall it it was Pazin who approached and took the gun and not this witness.

Q The affidavit for the search warrant was yours, though, Officer, is that correct?

A Yes.

Q In fact in your affidavit you stated that you had been advised by your fellow officers that defendant had had

1 rgpd

Frawley - Cross

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2 in his possession the gun within the last four days, is that
3 correct?

4 A That's correct.

5 Q Well, in your own mind did you believe that the
6 defendant had a gun when you approached him on October 7,
7 1974?

8 THE COURT: I don't know, I think I am going to
9 sustain an objection because I think on his testimony all he
10 did was observe Pazin. By the time you got there the gun
11 had been removed, is that correct?

12 THE WITNESS: It was being removed, yes.

13 Q Officer, at the point the decision had been made
14 to approach the defendant on the street who actually
15 approached him?

16 A There were a couple of units that pulled up into
17 the vicinity and we all exited our vehicles and started to
18 approach Mr. Bell.

19 Now, I know there were other officers approaching
20 him, but I was just concentrating on Mr. Bell and all I saw
21 was Mr. Pazin be the first one to confront Mr. Bell.

22 Q What was the purpose in approaching Mr. Bell?

23 A To inform him of the search warrant.

24 Q Did you think that you had to advise him of the
25 search warrant prior to going up to his apartment to execute

1 rgpd

2 it?

3 MR. EPSTEIN: Objection, your Honor.

4 THE COURT: Read that question back.

5 (Question read.)

6 THE COURT: I am going to sustain the objection
7 to that.

8 Q Officer, what if Mr. Bell had refused to grant
9 permission to search the apartment?

10 A If he refused for us --

11 Q Yes.

12 A We would have gone up and forced entry.

13 Q So you were going to execute it whether or not
14 Mr. Bell granted permission or not granted permission, is
15 that correct?

16 A That's correct.

17 Q Now, Officer, who was the first agent to reach
18 Mr. Bell?

19 A The first person to reach Mr. Bell was State
20 Trooper Investigator Nolan Pazin.

21 Q At the point that he reached Mr. Bell how far away
22 were you from the two of them?

23 A I would say approximately the distance between
24 myself and Mr. Epstein, 15 feet.

25 Q Was there any other officer or agent closer to the

1 rgpd

Frawley - Cross

38

2 two of them than yourself?

3 A That is a possibility, but --

4 THE COURT: If you recall.

5 A I don't recall.

6 Q Can you give an approximation of the other officers
7 and agents at that point, the point where Pazin reached
8 Mr. Bell?

9 A An approximation of their location you mean?

10 Q Yes.

11 A I couldn't tell you exactly where they were at the
12 time, but within --

13 THE COURT: Were there any others between you
14 and Pazin? Let's start out that way.

15 THE WITNESS: No.

16 THE COURT: There was no one nearer than you were
17 at that point that you recall?

18 THE WITNESS: Not to the best of my recollection,
19 but within a couple of seconds we were joined by other
20 officers, yes.

21 Q The other officers and agents who were there, were
22 they in unmarked cars?

23 A That's correct.

24 Q As the decision was made to approach the defendant
25 did some of them approach in their cars?

1 rgpd

Frawley - Cross

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2 THE COURT: Did someone what?

3 MR. HAFETZ: Did some of them approach in their

4 cars.

5 A Yes.

6 Q Did they have sirens on?

7 A No.

8 Q Did anyone shout or say anything to Mr. Bell prior
9 to Officer Pazin reaching him?10 A No, it was very calm. We tried not to bring any
11 attention.12 Q Where was the defendant at the exact moment that
13 Officer Pazin reached him?14 A He was standing in the trunk of his vehicle
15 stooped over.

16 Q Where was his wife?

17 A She was on the sidewalk next to the vehicle.

18 Q Again you approached him from what direction?

19 A Well, I approached the vehicle from the rear.

20 Now, Mr. Bell was in the trunk of the vehicle. Investigator
21 Pazin was standing behind the vehicle. I approached them
22 from the rear.23 Q What direction had you come from with
24 Officer Pazin?

25 A I wasn't with Officer Pazin. Officer Pazin came

1 rqp d

Frawlev - Cross

40

2 from another car. Now, I came from the intersection of
3 176th Street and Harrison Avenue. I parked on Harrison
4 Avenue just off the corner of 176th Street and I walked up
5 Harrison Avenue -- excuse me -- that's correct, up Harrison
6 Avenue to the vehicle.

7 Q On the same side. Officer, did you not say
8 before that you had been across the street from the defendant
9 in a school yard at the point that you observed him in the
10 trunk?

11 A Yes, and then when the decision was made we moved
12 our vehicle.

13 Q You exited from your vehicle?

14 A I was in my vehicle.

15 Q And you drove your vehicle?

16 A Yes, and I drove around the corner.

17 Q What did you observe Officer Pazin do as you
18 approached the defendant?

19 A I do not know what Mr. Pazin stated to Mr. Bell or
20 anything like that.

21 THE COURT: He didn't ask that. He just wanted
22 to know what you observed him do as you approached.

23 THE WITNESS: I saw Mr. Pazin put his hands onto
24 Mr. Bell around his waist when Mr. Bell was leaning over in
25 the trunk.

1 rcpd

Frawley - Cross

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2 Q What was Mr. Bell wearing, if you recall?

3 A If I remember correctly he was wearing a three-
4 quarter length -- it was a leather jacket and I am trying
5 to think of the color. It was a dark brown.

6 Q Would you indicate how far down on his body the
7 coat extended? Would you please stand up and do that,
8 Officer?

9 A Well, it was a three-quarter length. I believe
10 it was approximately down to here (indicating).

11 MR. HAFETZ: At a point midway between thigh and
12 knee.

13 Q After you observed Officer Pazin place his hands
14 at the defendant's side, what happened then, Officer?

15 THE COURT: What did you observe?

16 Q What did you observe?

17 A I observed Investigator Pazin -- his right hand
18 went underneath his jacket and removed a revolver.

19 Q His right hand on the knee did you say?

20 A No. His right hand went underneath Mr. Bell's
21 jacket and Investigator Pazin removed the revolver.

22 Q Did you know exactly from where he removed the
23 revolver?

24 A It looked like he removed it from the waist.

25 THE COURT: The right side?

1 rgpd

Frawley - Cross

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2 THE WITNESS: His right rear.

3 Q Up to that time had the defendant been told that
4 you had a search warrant for his apartment?5 THE COURT: I don't know if he can answer that
6 one.7 I think it is quite clear from the testimony you
8 had not told the defendant at that point that you had the
9 search warrant.

10 THE WITNESS: Right.

11 THE COURT: Whether he knew anybody else did is
12 another matter.13 Q Do you know whether anybody else did up to that
14 time?15 A I don't know whether Investigator Pazin did at
16 that time.

17 Q Did you hear Officer Pazin inform him?

18 A I didn't hear him, no.

19 Q Did Officer Pazin search the defendant prior to
20 removing the gun?

21 A Prior to removing the gun?

22 Q Yes.

23 A No, he just put his hands on him.

24 Q Did he conduct an exploratory search?

25 MR. EPSTEIN: Objection, your Honor.

rgpd

Frawley - Cross

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1 THE COURT: I think he answered. He said his
2 observation was he reached around him and then reached under
3 the coat and pulled out a gun. That is all you observed,
4 is that correct?
5

6 THE WITNESS: He put his hands on him, right.

7 Q I take it there was no exploratory search?

8 THE COURT: There may be, but he doesn't know
9 about it. That is all he saw.

10 Q Is that correct, sir?

11 A As far as I know.

12 Q Officer, you testified in regard to the events
13 in this case at a preliminary hearing in the Bronx criminal
14 court on February 6, 1975, did you not?

15 A Yes, I did.

16 Q I ask you, at that time, Officer, were you asked
17 this question and did you give this answer relating to the
18 events on October 7.

19 THE COURT: Have you got a page reference or have
20 you seen this?

21 MR. EPSTEIN: I have never seen it.

22 THE COURT: Why don't you stand with him.

23 MR. HAFETZ: Page 19 of the transcript.

24 "Q Would you please tell the Court what trans-
25 pired at this time and date.

rgpd

Frawley - Cross

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1 "A. On that date at approximately 8:15 p.m. we
2 observed Marce Bell and his female exit 1700 Harrison Avenue
3 and approach his car. At that time myself and New York
4 State Investigator Nolan Pazin (phonetically spelled)
5 approached the subject, confronted him, identified ourselves
6 and stated our purpose pursuant to the Federal District
7 Court search warrant. An exploratory search was made of the
8 defendant Marce Bell and we found in his possession a
9 revolver. At that time he was placed under arrest by myself,
10 advised of his rights and then read the bill of particulars
11 pursuant to the Federal District Court search warrant.
12 We accompanied Marce Bell back to his apartment 253 at 1700
13 Harrison Avenue. At that time we entered and started to
14 search the apartment."

16 Did you give that answer to that question?

17 A Yes, I did.

18 Q I ask you again, Officer, did you make an explora-
19 tory search on October 7, 1974?

20 A There was an exploratory search made when he was
21 taken out of the trunk and he was handcuffed.

22 THE COURT: The point is, that was after the gun
23 had been taken?

24 THE WITNESS: That is correct.

25 Q Officer, was the exploratory search made prior to

1 rgpd

Frawley - Cross

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2 the finding of the gun or after the finding of the gun?

3 A I don't know if there was any exploratory search
4 made by Investigator Pazin before the gun, but once I arrived
5 with Investigator Pazin we took him out of the trunk, hand-
6 cuffed him, conducted an exploratory search.

7 Q Officer, did you not testify in the Bronx Criminal
8 Court just about a month ago that an exploratory search was
9 made of the defendant Marce Bell and "We found in his
10 possession a revolver"?

11 A Maybe I used the wrong word on that, but that's
12 the way I stated it.

13 MR. EPSTEIN: Exploratory search is a term of
14 art that I don't know that Officer Frawley is qualified
15 to explain.

16 Q Officer, could you explain what you mean by an
17 exploratory search?

18 A I would conduct an exploratory search upon a person
19 to ascertain whether that person might have any instruments
20 that might be dangerous to me at the time of confrontation,
21 so the individual and I may not get injured.

22 Q I asked you what you meant in the Bronx Criminal
23 Court when you said that you conducted an exploratory search
24 of the individual prior to finding the pistol.

25 THE COURT: That is a sort of play on words there.

1 rcpd

Frawley - Cross

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2 I think as I understand the witness he said that he conducted
3 an exploratory search and that was after you got there, but
4 before that the other policeman had taken the gun; is that
5 what you are telling me today?

6 THE WITNESS: That's correct.

7 THE COURT: You are saying that when you testified
8 in the Bronx -- it is a little confusing, but it looks as
9 though the gun was found as the result of the exploratory
10 search. As I understand your testimony the gun had been
11 found before you ever got there.

12 THE WITNESS: It was found by Investigator Pazin
13 as I approached.

14 THE COURT: And the exploratory search that you
15 conducted was after you arrived --

16 THE WITNESS: Yes, sir.

17 THE COURT: At the car. All right.

18 Q So you are saying your testimony was inaccurate
19 in the Bronx Criminal Court?

20 THE COURT: I don't think you should say it was
21 inaccurate. It will speak for itself, I take it. He says
22 he made that answer to the question that you asked.

23 Q Was that answer correct, Officer?

24 MR. EPSTEIN: Objection, your Honor.

25 THE COURT: I am going to sustain the objection

1 rgpd

Frawley - Cross

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2 to that. .

3 Q Officer, was there any street light on the same
4 side of the street that you approached the defendant Bell?

5 A I cannot answer that, but I would say being a
6 street of New York City, yes, there were street lights, I
7 know that for a fact.

8 THE COURT: The question is whether you recall
9 whether you observed a street light, I take it, on the side
10 of the street where Mr. Bell's car was.

11 MR. HAFETZ: That's correct.

12 THE COURT: You recall seeing a street light on
13 that side of the street?

14 THE WITNESS: I don't remember.

15 Q Was there a light in the trunk of his car?

16 A I don't remember.

17 Q Were you able to see clearly the actions that
18 Officer Pazin took as he approached the defendant prior to
19 your arriving?

20 MR. EPSTEIN: Objection.

21 THE COURT: I think I am going to sustain the
22 objection to the form of the question.

23 Do you recall when you first observed
24 Officer Pazin? You told us about when he got in the trunk,
25 but when did you first observe him? Is that what you would

1 rcpd

Frawley - Cross

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2 like to know?

3 MR. HAFETZ: Yes, I want to know if he had a clear
4 and unobstructed view of Officer Pazin and what he did as
5 you reached him.

6 THE WITNESS: Officer Pazin's back was towards
7 me as I approached. Is that what you are asking me?

8 Q But you were able to see him place his hands around
9 the defendant's waist?

10 A I saw Officer Pazin reach up, yes. I saw his
11 hands going up onto the jacket.

12 THE COURT: I take it he was standing in the
13 street when he was reaching in the trunk, is that right?

14 THE WITNESS: He was standing in the rear of the
15 vehicle, yes, sir.

16 THE COURT: On the street?

17 THE WITNESS: On the street, yes, sir.

18 Q Again you were how far away at this time, approxi-
19 mately, at this point that Officer Pazin's hands went on the
20 waist of the defendant?

21 A I am walking towards him. I would say approximately
22 15 feet. I am not certain of that.

23 THE COURT: You had gotten out of your vehicle at
24 that point and were walking towards them?

25 THE WITNESS: Yes.

1 rgpd

Frawley - Cross

49

2 Q Did you have your gun out?

3 A No.

4 Q Did Officer Pazin have his gun out?

5 A I do not believe so.

6 Q Do you know if any of the other agents and officers
7 who were approaching had their guns out at this time?

8 A I didn't see any guns out.

9 Q Officer, as you approached the defendant at any
10 time prior to Officer Pazin removing the gun from him, did
11 you observe a bulge on the defendant's person?

12 A Did I myself?

13 Q Yes.

14 A No, I didn't.

15 Q Do you know whether the defendant is right-handed
16 or left-handed?

17 A I don't know.

18 THE COURT: Or ambidextrous, you don't know that
19 either?20 THE WITNESS: I know when he was processed he
21 did not state he was left-handed. At the time I did not
22 know.23 Q Officer, as you approached the defendant, at that
24 time did you consider yourself in danger?

25 MR. EPSTEIN: Objection, your Honor.

1 rgpd

Frawley - Cross

50

2 MR. HAFETZ: Your Honor, I believe that goes to
3 the heart of Terry and Sibron. That's what we are talking
4 about, isn't it?

5 THE COURT: I will let him answer the question
6 whether he felt he was in danger as he approached.

7 A Did I consider myself in danger?

8 Q Yes.

9 A I considered that there was a possibility of
10 danger, yes.

11 Q Arising from what?

12 THE COURT: I don't think you have to go into
13 detail. I think this is in the nature of police work.
14 I think in the kind of things like that things like that
15 can happen, is that right?

16 THE WITNESS: Yes.

17 Q You didn't take your gun out, is that correct?

18 THE COURT: No, he didn't take his gun out, that's
19 right.

20 A I didn't take my gun out. I probably had my hand
21 on my gun or I had my safety catch off on my holster, but I
22 did not have my gun out.

23 Q And then what happened after Officer Pazin found
24 the gun on the defendant's person?

25 A Officer Pazin -- Investigator Pazin removed the gun

rgpd

Frawley - Cross

51

and I observed him, he put it in the waist of his trousers and by that time then I was there next to Investigator Pazin and Mr. Bell and we removed him from the trunk of the car. I handcuffed him.

THE COURT: How did you remove him?

THE WITNESS: Well, he stepped out and we were holding him as he stepped out. Gently he stepped out.

He came out of the car. Mr. Bell was understandably a little upset and he was questioning us and everything like that. He was just upset at the time. I told him he was under arrest for the possession of the gun. During that time I was handcuffing him and I conducted an exploratory search of him to see if there possibly were any more weapons or anything like that.

THE COURT: Did you find any other weapons?

THE WITNESS: No, your Honor.

Q Have you said anything yet about the search warrant?

A Not at that time. Well, that came immediately afterwards.

THE COURT: After the exploratory search?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Officer, you stated that the gun was found in the waist of the defendant, is that correct?

1 rgpd

Frawley - Cross

52

2 A It appeared to me, yes, that that's where
3 Investigator Pazin removed it from.

4 Q Officer, were you asked these questions and did
5 you give these answers at the Bronx Criminal Court?

6 THE COURT: Mr. Epstein, do you want to follow
7 while he is asking these questions?

8 MR. EPSTEIN: Yes.

9 Q "Question: And where was he when you first saw
10 him?

11 "Answer: When we first observed him he was
12 exiting 1700 Harrison Avenue approaching his car.

13 "Question: And what did you do at that time?

14 "Answer: We observed him for a couple of minutes
15 and then we realized he had a flat tire on his car so we
16 approached Mr. Bell. When we approached him he was in the
17 trunk of his car removing a spare tire.

18 "Question: And what did you do then?

19 "Answer: We identified ourselves.

20 "Question: And then what?"

21 Colloquy at the bench.

22 "Question: Did you search him at that time at
23 the trunk?

24 "Answer: Well, while he was in the trunk. As a
25 matter of fact, he was, yes, sir.

rgpd

Frawley - Cross

53

"Question: And what did you find on him, Officer, at that time?

"Answer: I did not find it. It was Investigator Pazin who found a .38 caliber revolver on his -- in his possession.

"Question: Where?

"Answer: It was in his right rear, in his hands, sleeve."

THE COURT: In his what?

MR. HAFETZ: Sleeve. S-l-e-e-v-e.

A May I clarify that?

Q Did you give that answer, Officer?

A I meant the sleeve -- I was pointing at that time, Counselor, at the trousers. I did not state the waistband, I said the sleeve and I was pointing at the waist of the trousers.

Q So that when you said in his hands, sleeve, you didn't mean hands or sleeve, you meant trousers, is that correct?

A In the sleeve of the trouser, yes.

Q The what?

A Well --

Q Sleeve of his trousers, is that what you said?

A The waist of his trousers. I just didn't use the

1 rgpd

Frawley - Cross

2 right word at the time, but I was pointing at the time, yes.

3 Q But now you are using the right word?

4 A Yes, I am using the right word now.

5 Q Is that testimony accurate, Officer, in the Bronx
6 Criminal Court?

7 MR. EPSTEIN: Objection, your Honor.

8 THE COURT: I will sustain the objection to that.

9 Q Officer, did you decide to change your testimony
10 since the hearing at the Bronx Criminal Court?

11 MR. EPSTEIN: Objection, your Honor.

12 THE COURT: I will let him answer whether he did
13 or didn't.

14 A I am not changing anything.

15 Q Officer, are you certain that the gun was not
16 found in the trunk of the car?

17 A Am I certain?

18 Q Yes.

19 A I saw Investigator Pazin removing it from under-
20 neath his jacket, yes.

21 MR. HAFETZ: Excuse me just one moment.

22 (Pause.)

23 MR. HAFETZ: I have no further questions.

24 THE COURT: Any other questions?

25 MR. EPSTEIN: Just a couple of further questions,

1 rgpd

Frawley - Redirect

55

2 your Honor.

3 REDIRECT EXAMINATION

4 BY MR. EPSTEIN:

5 Q Officer Frawley, there has been some confusion
6 to the search conducted of Mr. Bell prior to his arrest.
7 Would you please explain again what if anything was done
8 to Mr. Bell before he was placed under arrest?

9 A As I approached Mr. Bell Investigator Nolan Pazin
10 had already confronted Mr. Bell. I observed Investigator
11 Pazin placing his hands onto Mr. Bell who was in the trunk.
12 At that time I heard voices. Now, I don't know what was --
13 I cannot be accurate of what was said. I see Investigator
14 Pazin's right hand go underneath Mr. Bell's jacket and from
15 that I see -- I see him going up into his jacket and then
16 the revolver came out. By the time I was there
17 Investigator Pazin was taking the revolver and putting it
18 into the waist of his trousers.

19 Q Officer Frawley, was that the extent of the search
20 of Mr. Bell's person prior to his arrest?

21 A Prior to his arrest?

22 Q Prior to his arrest.

23 A That was it.

24 Q I direct your attention to November 13, 1974.

25 Did you have occasion on that date to testify before a

1 rgpd

Frawley - Redirect

56

2 Federal Grand Jury?

3 A Yes, I did.

4 Q During the course of the testimony --

5 MR. HAFETZ: I am going to object to reading of
6 prior testimony.

7 Is this for substantive purposes?

8 MR. EPSTEIN: I think prior inconsistent state-
9 ments are admissible when there is a suggestion that the
10 witness has recently fabricated --

11 THE COURT: Let me see it.

12 MR. EPSTEIN: This question, your Honor, and that
13 answer (indicating).

14 THE COURT: I think I will sustain the objection
15 on that.

16 MR. EPSTEIN: Your Honor, the only reason I was
17 offering it was as a prior inconsistent statement.

18 THE COURT: Yes, assuming there is any incon-
19 sistency, that's all right.

20 MR. EPSTEIN: No further questions.

21 THE COURT: Do you have any other questions?

22 MR. HAFETZ: No further questions.

23 THE COURT: You are excused, sir.

24 (Witness excused.)

25 THE COURT: Let's take our morning recess at this

1 rgpd

Pazin - Direct

57

2 point.

3 (Recess.)

4 N O L A N P A Z I N, called as a witness by the
5 Government, being first duly sworn, testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. EPSTEIN:

9 Q Mr. Pazin, how are you employed?

10 A I am employed by the New York State Police.

11 Q Do you have any particular assignment?

12 A My assignment at this time is with the New York
13 Drug Enforcement Task Force in the City.

14 Q How long have you been employed by the New York
15 State Police?

16 A I have been employed by the New York State Police
17 since November 13, 1967.

18 Q Now, Mr. Pazin, I direct your attention to the
19 evening of October 7, 1974. Were you on duty at that
20 time?

21 A I was.

22 Q Where were you on duty?

23 A I was on duty with the New York Drug Enforcement
24 Task Force.

25 Q Did there come a time when you arrived at the

1 rgpd

Pazin - Direct

58

2 vicinity of 1700 Harrison Avenue in the Bronx?

3 A What number, sir?

4 Q 1700 Harrison Avenue.

5 A There was.

6 Q What if anything happened when you arrived there?

7 THE COURT: Do you remember what time you got up
8 there, sir?

9 THE WITNESS: It was somewhere after 6:00 o'clock.

10 THE COURT: After 6:00 p.m.?

11 THE WITNESS: After 6:00 p.m.

12 A At the time we set up surveillance on the apartment--
13 on the area ascertaining whether or not the defendant would
14 leave or exit the building.15 Q Mr. Pazin, by the defendant who are you referring
16 to?17 MR. EPSTEIN: May the record reflect the identi-
18 fication of Mr. Bell.

19 A Mr. Bell, right.

20 Q Continue, please.

21 A We were there maybe -- the exact amount of time is
22 unknown to me, but the subject did exit the building and
23 was under surveillance, at which time he went to a motor
24 vehicle.

25 Q Do you remember approximately the time that he left

1 rgpd

Pazin - Direct

59

2 the building?

3 A No, I don't.

4 Q Continue, please.

5 A The subject exited the building --

6 THE COURT: Where were you?

7 THE WITNESS: I was in a vehicle.

8 THE COURT: Whereabouts was the vehicle?

9 THE WITNESS: Right outside the building.

10 THE COURT: On the same side?

11 THE WITNESS: Or the opposite side. You have
12 got to bear along with me. I am not a city boy, I am from
13 upstate New York. As far as East Side and West Side I am a
14 little mixed up.

15 THE COURT: But you were on the street by the
16 entrance of the building?

17 THE WITNESS: Right.

18 THE COURT: And his car --

19 THE WITNESS: Was across the street.

20 A The subject did exit the building and go over to
21 his vehicle -- or a vehicle later described through radio
22 communication as his vehicle. The subject did have a black
23 female with him at the time. He walked around his vehicle,
24 at which time he went back to the trunk area and opened the
25 trunk to his vehicle.

1 rgpd

Pazin - Direct

60

2 THE COURT: Where were you when you made these
3 observations, sitting in your car?

4 THE WITNESS: Sitting in my car, your Honor.

5 THE COURT: All right.

6 A At this time it was determined by the case officer,
7 William Frawley, that at this time we will execute the search
8 warrant which we had obtained earlier that evening. At this
9 time I was on the driver's side of my vehicle, so I exited
10 to walk up to the defendant and at the time I walked up to
11 the defendant he had himself inside the trunk.

12 THE COURT: What do you mean by had himself inside
13 the trunk?

14 THE WITNESS: Inside the trunk. He had two feet
15 on the floor of the trunk.

16 THE COURT: He was standing in the trunk?

17 THE WITNESS: The trunk lid was open. He was
18 inside and he was bending over, like to remove a tire.

19 Q And what happened at that point?

20 A At that point I took my New York State Police
21 identification out of my pocket. I walked up to the
22 subject and I told him that I was the police, at which time
23 he turned around to see who I was and at this time I seen
24 on his right side a small bulge. I just grabbed him by
25 the waist, at which time I felt what appeared to me to be a

1 rgpd

Pazin - Direct

61

2 gun.

3 Q What did you do at that point?

4 A At that time I notified Mr. Frawley, who was, I
5 believe, on my right-hand side that the subject, I believe,
6 had a gun and for him to keep him under cover, at which time
7 I just reached around inside and took the gun away and helped
8 him out of his vehicle.

9 Q I now show you Government's Exhibit 2 in evidence
10 and ask if you can identify it.

11 A Yes.

12 Q What is it, please?

13 A It is the gun that was taken off the defendant.

14 Q What if anything did you do after you removed the
15 gun from the defendant's person?

16 A Well, like I said I helped the subject out of the
17 vehicle. I helped him out of the vehicle, advised
18 Mr. Frawley that it was the gun that I had taken from the
19 subject, at which time the subject was handcuffed and advised
20 as to our --

21 THE COURT: What did you do with the gun?

22 THE WITNESS: I put it inside my own pants pocket --
23 Not my pants pocket, my waistband, at which time the subject
24 was handcuffed and advised as to the reason we were up there
25 and that we had a search warrant for his apartment and would

1 rgpd

Pazin - Direct/Cross

62

2 he accompany us back to his apartment.

3 Q What if anything happened at that point?

4 A At that point as we were walking into his apartment
5 he was advised of his constitutional rights by Policeman
6 Frawley.

7 Q What if anything did he say to you in the apartment?

8 A I can't recall any -- I recall a bunch of comments
9 back and forth, but per se I remember nothing.

10 MR. EPSTEIN: No further questions.

11 CROSS-EXAMINATION

12 BY MR. HAFETZ:

13 Q Officer, did you take any notes on the events
14 of this day?

15 A Did I take any notes?

16 Q Yes.

17 A No, sir.

18 Q Did you ever make any memoranda relating to these
19 events?

20 A No, sir.

21 Q Any reports to the State agency for whom you worked?

22 A No, sir. I am not required to report to the State.
23 I report to the New York Drug Enforcement Task Force.24 Q You are aware that a search warrant was applied
25 for for the defendant's apartment earlier that day, correct?

rgpd

Pazin - Cross

63

1
2 A Correct.

3 Q Were you present with Officer Frawley when he
4 applied for the search warrnat?

5 A I was with him at the time, correct.

6 Q You read the affidavit that he submitted?

7 A No, I did not.

8 Q Do you know the affidavit made reference to an
9 informant?

10 A I had no knowledge of the affidavit whatsoever.
11 I was just there to assist. In the agency of the New York
12 Drug Enforcement Task Force it is a policy that two officers
13 go out of the office at the exact same time and my only
14 function at that time was just to assist Mr. Frawley, but
15 not in the paperwork.

16 Q Do you know what the warrant gave authority to
17 search for?

18 A His premises.

19 Q Did it include authority to search him?

20 MR. EPSTEIN: Your Honor, the document speaks for
21 itself.

22 THE COURT: If he knows. You can say you don't
23 know.

24 THE WITNESS: I don't know.

25 THE COURT: This is because he isn't familiar with

1 rgpd

Pazin - Cross

64

2 the warrant or the supporting affidavit.

3 Q You say on October 7 you arrived in the vicinity
4 of the defendant's apartment at approximately 6:00 o'clock?

5 A I didn't say that. I said somewhere after 6:00
6 o'clock.

7 Q Can you give us your best approximation?

8 A I have no idea.

9 Q How many officers and agents were with you when you
10 arrived?

11 A I would safely say maybe around the area of six
12 officers.

13 Q Six including yourself?

14 A They were not with me. They were in various
15 cars.

16 Q I am sorry, six in addition to yourself?

17 A That I really don't know. I didn't take count
18 when I left the office.

19 THE COURT: What were the lighting conditions at
20 the time?

21 THE WITNESS: It was dark at the time, your Honor.

22 THE COURT: Was there street lighting?

23 THE WITNESS: Yes, there was street lighting on
24 the block in question.

25 Q Where did you position yourself when you arrived

1 rgpd

Pazin - Cross

65

2 there?

3 A I positioned myself just -- let's say his building
4 was in front of me and I was on the exact same side as his
5 building. As I say I don't know the east and west side of
6 your city.

7 THE COURT: But you were on the same side as the
8 entrance of the building. How far from it?

9 THE WITNESS: I would say my car was parked two
10 cars down from the entrance to his building, three at the
11 most.

12 Q Did you stay in your car?

13 A Yes, I did.

14 Q Was there anyone else in your car?

15 A Yes, there was.

16 Q How long did you sit in your car before you saw
17 the defendant exit from the building?

18 A I have no idea.

19 Q Can you give me an estimate?

20 THE COURT: He is talking about can you remember
21 whether it was an hour or two hours.

22 THE WITNESS: It was probably at least an hour
23 that we were sitting there waiting for him.

24 Q Was any attempt made to execute the execution of
25 the search warrant at this time?

rqpd

Pazin - Cross

66

1 THE COURT: He doesn't know whether there was any
2 attempt.

3 Did you make any attempt at all?

4 THE WITNESS: I made no attempt whatsoever.

5 THE COURT: Did you observe anyone else doing it?

6 THE WITNESS: No, I did not.

7 Q In fact, the decision had been made not to execute
8 at that time, but to wait until he exited from the building,
9 is that correct?

10 A I don't know. I am not the case officer that was
11 involved.

12 THE COURT: You don't know what the decision was?

13 THE WITNESS: No, I do not.

14 Q Officer, what were you told you were doing there?

15 A I was told to surveil the building and wait for
16 the defendant if the defendant exited the building. We
17 didn't know if the defendant was in the building or not at
18 the time.

19 Q What were you told to do if you saw the defendant
20 exit the building?

21 A What I was told was just take orders, which I do,
22 from my superiors. I do not give orders, I take them.

23 THE COURT: Did you know the defendant?

24 THE WITNESS: I have seen the defendant in pictures
25

1 rgpd

Pazin - Cross

67

2 and I have seen him in previous surveillances.

3 Q Were you aware that the defendant had been seen
4 carrying a gun several days prior to October 7?

5 A No, I was not.

6 Q Had you ever heard prior to October 7 that the
7 defendant possessed a gun?

8 A Yes.

9 Q Was there any discussion prior to arriving in the
10 vicinity of the defendant's apartment about what would be
11 done when the defendant was seen exiting the building?

12 A No. No pre-plans were made at all. They are
13 unbeknown to me if they were made.

14 THE COURT: At least you had no knowledge.

15 THE WITNESS: I had no knowledge.

16 Q Was there any discussion about searching the
17 defendant if he exited the building?

18 A As far as I am concerned, no. To my knowledge,
19 no.

20 Q What happened as the defendant exited the building?

21 A As I stated, the defendant exited the building and
22 went to a vehicle, which was later described as his vehicle,
23 walked around it and then opened the trunk.

24 THE COURT: As I understand it you were sitting in
25 your car?

1 rgpd

Pazin - Cross

68

2 THE WITNESS: I was sitting in my car and my car
3 was right on the left-hand side, maybe the distance from
4 here to the wall, away.

5 Q Did his wife come out with him at that time?

6 A There was a girl with him at that time.

7 Q What happened after you saw the defendant do this?
8 You just described the sequence of events starting with the
9 defendant exiting from the building and going over to his
10 car.

11 A Right.

12 Q And then around to the trunk. What did you do
13 after that?

14 A I stayed right there until I was told what to do.
15 As I say I am not a superior officer so I don't make the
16 decisions.

17 Q We understand that you were not a superior officer.
18 What were you told to do at that time?

19 A I was told not to do anything. There were no
20 communications as to what to do or what not to do given at
21 that time.

22 Q Officer, there finally came a time, as I understand
23 it, where you were told to leave your vehicle.

24 A Right. At that time when the subject was inside
25 the trunk --

rgpd

Pazin - Cross

69

Q By the subject, of course you mean Mr. Bell.

A Mr. Bell, the defendant, at that time was inside the trunk and at that time it was determined by the superior officer that the subject should be approached and to tell him that we had a search warrant for his apartment and to see if he would accompany us back into his apartment.

Q Let's take that a little slower.

There came a communication to you over the radio?

A Correct.

Q Again, who did the communication come from?

A It came from Officer Frawley.

Q What did he tell you over the radio?

A He didn't tell me per se to do anything. It was just as a group movement, that the subject should be approached now and advised that we do have a search warrant to search his premises and for him to accompany us back into his room or apartment.

Q Were you told to search for a gun?

A I was not. I most certainly was not.

Q Was there anything stated on the radio about be careful, he may have a gun?

A Nothing at all.

Q What did you do at that time?

A At that time I exited my vehicle from the driver's

1 rgpd

Pazin - Cross

70

2 side on which I was sitting and I walked up to the subject,
3 the defendant.

4 THE COURT: Was there anybody else in the car with
5 you?

6 THE WITNESS: Yes, there was. There was a
7 sergeant in the car with myself.

8 THE COURT: Do you remember his name?

9 THE WITNESS: Sergeant John Forkin, F-o-r-k-i-n.

10 THE COURT: Did he get out of the car?

11 THE WITNESS: Yes, he did. He got out the
12 passenger side.

13 THE COURT: And you were--

14 THE WITNESS: I was on the passenger side.

15 THE COURT: And you went right across the street?

16 THE WITNESS: Right, sir.

17 Q Was the sergeant right alongside you?

18 A I don't remember the sergeant's position at that
19 time because my main interest was to go up to the subject
20 and identify myself as I knew I was the first officer that
21 would arrive on the scene.

22 Q What did you observe as you approached the
23 defendant?

24 A He was bending over inside his trunk. He was
25 physically inside his trunk, with his two feet on the trunk

1 rgpd

Pazin - Cross

71

2 floor bending over.

3 Q Were his feet off the ground? He was actually
4 in the trunk?

5 A His two feet, as I have stated, were inside the
6 trunk on the trunk floor.

7 Q Did you say something to him as you approached him?

8 A As I got close enough so that he could hear me I
9 told him that it was the police and I advised him that it
10 was the police, at which time he turned around and looked to
11 see who I was and I had my badge out.

12 Q Did you have your gun out?

13 A No, I did not.

14 Q Weren't you afraid, Officer, that he might be
15 armed?

16 A I had other fellow officers there.

17 Q So you weren't in fear at that time for your own
18 safety, were you?

19 A Not really.

20 MR. EPSTEIN: Objection.

21 A You must realize that I am a New York State Trooper
22 and it is not because of this, but we don't work in pairs
23 in the State, we work singly and I have never --

24 Q This time you had a large number of people with
25 you?

1 rgpd

Pazin - Cross

72

2 A I would say probably more than six or six, there-
3 abouts, right.

4 Q And you were aware that at least some of them were
5 following behind you, were you not, as you approached?

6 A I would hope so, yes.

7 Q In fact they had all been given the radio signal
8 at the same time?

9 A That I don't know. I don't have the slightest
10 idea. I assume due to the fact that I received it over the
11 air they also did receive it.

12 Q What did you say to the defendant as you approached
13 him?

14 A I told him that it was the police.

15 Q Did you say anything else?

16 A No, I did not.

17 Q What happened at that time?

18 A He turned around to his right side and moved his
19 body to see who it really was, at which time I did see --
20 he had a three-quarter coat on and when he did turn around
21 you could see the handle of the gun protrude from his coat --
22 bulge from his coat, not protrude, put an indentation, which
23 would indicate to myself that there was something in there
24 that I should look after.

25 Q Where were his hands at this time?

1 rgpd

Pazin - Cross

73

2 A They were still down.

3 Q What did you do when you observed the bulge as you
4 say?5 A I just grabbed him right by the waist. I told him
6 not to move and I just grabbed him by the waist, at which
7 time I noticed Mr. Frawley on the right-hand side and I told
8 him "I think he has a gun" so I told him to move, I reached
9 around and I grabbed the handle of the gun and I took it
10 from his right side.

11 Q How far was Officer Frawley from you at that time?

12 A Not far. Maybe --

13 Q Approximately.

14 A Oh, I'd say maybe a couple of arms distance, maybe
15 an arm's distance away.

16 Q Approximately three feet?

17 A It could be.

18 Q On what side of you was Officer Frawley?

19 A He was on my right side.

20 Q The defendant, as he turned toward you, which side
21 was visible to you, his right or his left?

22 A His right side would be visible.

23 Q So from where you stood it appeared that his right
24 side was visible to Officer Frawley also?

25 A I couldn't testify to what Officer Frawley saw, I

1 rcpd

Pazin - Cross

74

2 don't know.

3 THE COURT: All you can say was it was the same
4 side, right?

5 THE WITNESS: Right, it was the exact same side.
6 I don't know if he saw what I saw or not.

7 Q Officer, could you come down and show us the
8 approximate positions of where the defendant was, where you
9 were and where Officer Frawley was when you observed the
10 bulge. Could you step off the witness stand and give us
11 a physical demonstration.

12 A Who do you want first, do you want your defendant?

13 Q Using this as approximately the trunk of the car
14 could you show us.

15 A This is the trunk of the car. This was the floor
16 of the car. The defendant was standing on top of this
17 bending over. All right?

18 Q Could you give us your approximate distance from
19 him, then?

20 A I would say probably just about like this. Let's
21 say this was the trunk, all right, the edge of the trunk
22 with the bumper of the vehicle. I was standing just about
23 like this.

24 Q Could you tell us where Officer Frawley was at this
25 time?

1 rgpd

Pazin - Cross

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2 A Officer Frawley at that time I don't know where he
3 was. At that particular moment I didn't realize where
4 Mr. Frawley was. He could have been over across the street.

5 Q You stated there was a point at which Officer Frawley
6 was about three feet away.

7 A Right.

8 Q What point in time was that?

9 A After I had advised the defendant it was the police
10 the defendant then turned and looked this way (indicating)
11 and I then looked, saw the bulge and I went and grabbed him
12 around the side and I looked over and Frawley was there.

13 THE COURT: Before you removed the gun?

14 THE WITNESS: Before I removed the gun, right,
15 your Honor.

16 Q So Frawley was then approximately three feet away
17 from you on your right side facing towards the defendant
18 in the trunk?

19 A Right. I was say maybe not quite three foot.
20 Maybe it might have been a little further than three foot.

21 Q From where Officer Frawley stood, was there any-
22 thing obstructing his view of the bulge in the defendant's
23 pocket?

24 A I haven't any idea.

25 Q Try and give us --

1 rgpd

Pazin - Cross

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2 A I can't speak for Officer Frawley.

3 THE COURT: I don't think he can answer that
4 question.

5 MR. HAFETZ: I am not asking what Officer Frawley
6 saw, I am asking whether there was any physical obstruction.

7 THE COURT: I don't think he can answer that
8 question and I am going to sustain the objection.

9 Q But you are certain you saw a bulge, right,
10 Officer?

11 A I am positive I saw the bulge.

12 Q Did Officer Frawley have his gun out as you
13 reached for the defendant's bulge?

14 A That I don't know. Through the excitement,
15 knowing the subject had a gun I just --

16 THE COURT: Don't guess, you don't know?

17 THE WITNESS: I don't know.

18 Q At the point you reached for the bulge had the
19 sergeant arrived yet at the trunk?

20 A I don't know. I didn't see the sergeant there
21 at the time, no.

22 Q When for the first time did you see the sergeant
23 at the trunk, in the vicinity of the trunk?

24 A When I removed the gun I noticed the sergeant also
25 there and then after I removed the gun we took the defendant

1 rcpd

Pazin - Cross

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2 out of the trunk.

3 Q When you observed the sergeant did he have the gun
4 in his hand?

5 A Did he have his gun in his hand?

6 Q Yes.

7 A Not that I recall.

8 Q Are you sure it wasn't the sergeant that placed
9 the defendant under arrest?

10 A I am positive it wasn't.

11 Q Was the sergeant from your squad?

12 A Was the sergeant from our squad?

13 Q Yes.

14 A Yes, he was.

15 Q What is his name?

16 A Sergeant John Forkin, F-o-r-k-i-n.

17 Q Did Sergeant Forkin prepare any memorandum or
18 report on this incident?

19 A I have no knowledge of it.

20 Q Did anyone from your agency to your knowledge
21 prepare a memorandum?

22 THE COURT: What do you mean by his agency, the
23 joint task force?

24 MR. HAFETZ: State police.

25 A As I indicated before, I am on loan to the Federal

1 rcpd

Pazin - Cross

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2 Government working in the City and I have no -- my agency
3 has nothing to do -- I don't report my crimes or my arrests
4 to my agency.

5 Q Is your answer that your agency did not prepare
6 any report or memorandum to the defendant of your knowledge?

7 THE COURT: You are talking about the State police?

8 MR. HAFETZ: Yes.

9 A There was no reason for them to, no.

10 Q Officer, what was the purpose of approaching the
11 defendant on the street?

12 A The purpose of approaching him?

13 Q Yes.

14 A To advise him that there was a search warrant for
15 his premises.

16 Q You already had the warrant, correct?

17 THE COURT: I didn't gather that you had the
18 warrant.

19 THE WITNESS: I didn't have the warrant on me.

20 Q You knew Officer Frawley had, did you not?

21 A I assume he had, yes.

22 Q You know of course that a warrant gives you authority
23 to search a premises, is that correct?

24 A Premises, correct.

25 Q So you knew you had authority to search whether the

1 rapd

Pazin - Cross

79

2 defendant consented or did not consent, is that correct?

3 A Pardon me?

4 THE COURT: I don't know, you are asking him a
5 legal question and he is a State Trooper. I don't know
6 whether he knows the answer to that and I don't know what
7 the State law is either.

8 Q As I understand your testimony you waited outside
9 the defendant's premises for approximately an hour and a
10 half with one of your fellow officers having a search warrant
11 for the premises?

12 MR. EPSTEIN: Objection. That wasn't his
13 testimony.

14 Q How long did you wait outside the premises?

15 A I have no idea. It was about an hour, I would
16 say, I have no idea, an hour and a half or what.

17 THE COURT: You weren't looking at your watch?

18 THE WITNESS: No, right.

19 Q Do you know who had the search warrant in his
20 possession?

21 A I assume that the case officer, being William
22 Frawley, had it. I'm not sure if he did.

23 THE COURT: You had been with Frawley earlier and
24 you knew he was applying for the warrant and from that you
25 might have concluded that he had the warrant in his

1 rgpd

Pazin - Cross

80

2 possession?

3 THE WITNESS: Right, your Honor.

4 Q Officer, just going back for a minute, from the
5 point that you observed the bulge in the defendant's pocket
6 you had a clear and unobstructed view of him, is that
7 correct?

8 A Very much so.

9 Q How were the lighting conditions near where you
10 stood at that point?

11 A It was lighted.

12 Q From where?

13 A I don't know. I have no idea where the lights
14 came from. It was a lighted area. It wasn't like I was
15 underneath a light by no stretch of the imagination, but it
16 was a lighted area.

17 THE COURT: Was there any light in the trunk?

18 THE WITNESS: I don't remember that.

19 Q It was certainly light enough to observe the bulge
20 from a couple of feet away, is that correct?

21 A Yes.

22 Q Where did you say the gun was prior to your
23 removing it?

24 A Prior to my removing it, on his right side, sir.

25 Q Where on his right side?

1 rcpd

Pazin - Cross

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2 A His right hip.

3 Q In the pocket?

4 A No, I believe when I reached around I reached
5 around the belt area.

6 Q What happened after that?

7 A I then, as I said, helped the subject -- the
8 defendant out of the trunk and he was handcuffed. The
9 defendant's gun went inside my belt pocket or belt and then
10 we accompanied him upstairs.11 Q Was anything said about a search warrant at that
12 time?13 A Right. He was advised that the reason we were
14 there was because of the search warrant.

15 THE COURT: Who told him that?

16 THE WITNESS: Mr. Frawley did.

17 A He was advised of his constitutional rights and
18 brought up into the building.19 Q Where was the defendant's wife at the point that
20 you placed him under arrest?

21 A I don't know, sir.

22 THE COURT: You don't recall?

23 THE WITNESS: I don't recall.

24 MR. HAFETZ: I have no further questions.

25 MR. EPSTEIN: One or two.

1 rcpd

Pazin - Redirect

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2 REDIRECT EXAMINATION

3 BY MR. EPSTEIN:

4 Q Mr. Pazin, were you aware on the evening of
5 October 7 that Mr. Bell had a criminal record?

6 A I was.

7 Q Were you aware that he had been convicted of
8 manslaughter?

9 A I was.

10 MR. EPSTEIN: No further questions.

11 THE COURT: Any other questions?

12 MR. HAFETZ: No.

13 THE COURT: Thank you, Mr. Pazin. You are
14 excused, sir.

15 (Witness excused.)

16 MR. EPSTEIN: The Government calls John O'Leary.

17 J O H N O ' L E A R Y, called as a witness on behalf
18 of the Government, being first duly sworn, testified
19 as follows:

20 DIRECT EXAMINATION

21 BY MR. EPSTEIN:

22 Q Mr. O'Leary, how are you employed?

23 A I am employed as a special agent with the United
24 States Treasury Department. The Bureau of Alcohol, Tobacco
25 and Firearms.

1 rgpd

O'Leary - Direct

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2 Q How long have you been so employed?

3 A Approximately five years.

4 Q Mr. O'Leary, I direct your attention to October 11,
5 1974. Were you on duty on that day?

6 A Yes, I was.

7 Q Did there come a time on that day when you
8 received a .38 caliber revolver bearing serial number 013196?

9 A Yes.

10 Q From whom did you receive it?

11 A Police Officer Minichiello.

12 Q What if anything else did he give you?

13 A Three rounds of .38 caliber ammunition.

14 Q I now show you Government's Exhibits 2 and 2A and
15 ask if you can identify them.

16 A Yes, sir.

17 Q What are they, please?

18 A Those are the same items that I received from
19 Police Officer Minichiello.

20 THE COURT: How can you tell that, sir?

21 THE WITNESS: By the serial number and I also
22 recognize the initials that were scraped on the side there.23 Q Directing your attention to October 15, 1974,
24 were you on duty on that day?

25 A Yes, I was.

1 rgpd

O'Leary - Direct

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2 Q What if anything did you do with Government's
3 Exhibit 2 on that day?

4 A I test fired it.

5 Q What were the results of your test?

6 A The weapon was fully operable.

7 Q Mr. O'Leary, Government's Exhibit 2 bears the
8 markings "INA made in Brazil" on the main part of the gun
9 and then there are two what can be termed screws on either
10 side of the handle with various initials. In the course
11 of your duties what did you discover about those initials
12 and about those markings?

13 MR. HAFETZ: I am going to object to the form of
14 the question as to what he discovered of the initials on
15 the gun and I am going to object to the lack of any founda-
16 tion for him, if he is offering him as an expert witness as
17 to the initials.

18 THE COURT: Yes, I think I will go along with that.

19 You say, Agent O'Leary, that you are in the
20 Treasury Department of the Bureau of Firearms, Tobacco and
21 all these other things?

22 THE WITNESS: Yes.

23 THE COURT: What do you do there? What is your
24 particular job?

25 THE WITNESS: I am a special agent and I enforce

1 rcpd

O'Leary - Direct

2 the laws under our Bureau's jurisdiction which are alcohol,
3 tobacco and firearms.

4 THE COURT: Firearms. What is your particular
5 role with respect to firearms?

6 THE WITNESS: Well, arrest individuals who violate
7 the --

8 THE COURT: That is the special agent. Have you
9 studied guns?

10 THE WITNESS: No.

11 THE COURT: All right.

12 MR. HAFETZ: I am going to object to any questions
13 asked of this man about the identity of that gun.

14 THE COURT: You say, though, you see on the side
15 it says something about "Made in Brazil"?

16 THE WITNESS: Yes, sir.

17 MR. EPSTEIN: I have no further questions.

18 THE COURT: Let me see the gun.

19 MR. EPSTEIN: I will point out that it says
20 "Made in Brazil" on one side and the screws also say "Brazil"
21 on them.

22 THE COURT: Have you ever seen a gun like this
23 before?

24 THE WITNESS: Yes.

25 THE COURT: Do you know what the guns are called?

rqpd

O'Leary - Direct

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THE WITNESS: Yes.

THE COURT: What is it?

THE WITNESS: It is a .38 caliber.

THE COURT: I know it is a .38 caliber. Do you know anything about the manufacturer?

THE WITNESS: What the initials stand for?

THE COURT: Yes.

MR. HAFETZ: Your Honor, I am going to object to that unless the man is qualified as an expert.

THE COURT: He said he has seen these guns before
and he said he has seen these initials before.

MR. HAFETZ: May I inquire on voir dire before he is permitted to give any testimony as to that?

THE COURT: INA, what does that mean, do you know?

THE WITNESS: Industrial National Arms.

THE COURT: Industrial National Arms, and you have seen other guns with that initial on it?

THE WITNESS: Yes.

THE COURT: All right.

MR. EPSTEIN: I have no further questions.

CROSS-EXAMINATION

BY MR. HAFETZ:

Q Officer, in regard to the screw on the side of the gun that contains the words "Brazil," "INA" and "Brazil," do

1 rgpd

O'Leary - Cross

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2 you know when that screw was put on this gun?

3 A No, I don't.

4 Q Do you know whether it was put on in Brazil, in
5 New York or anywhere else?

6 A Definitely no, but being that the gun was --

7 Q Officer, yes or no? It is a yes or no question.
8 Do you know for a fact whether it was put on in
9 Brazil or New York or elsewhere?

10 A No.

11 Q You don't know where it was put on, do you?

12 A No.

13 Q Is that correct?

14 A Correct.

15 Q How long have you been with Alcohol, Tobacco and
16 Firearms?

17 A Approximately five years.

18 MR. HAFETZ: I have no further questions and I am
19 going to object to any testimony elicited as to --

20 THE COURT: All right, the objection is overruled.

21 MR. HAFETZ: The testimony of the markings
22 "Brazil" and "INA" on the ground that the witness does not
23 have proper qualification.

24 THE COURT: You have seen that type of gun before?

25 THE WITNESS: Yes.

rgpd

O'Leary - Cross

38

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MR. EPSTEIN: I have no further questions.

THE COURT: All right.

MR. HAFETZ: Your Honor, may I inquire?

THE COURT: You want to ask him more?

MR. HAFETZ: Yes.

THE COURT: Sure, that's fine.

FURTHER CROSS-EXAMINATION

BY MR. HAFETZ:

Q When you say you have seen that kind of a gun before, Officer, where did you see it?

A I have seen them in our evidence vault. I have seen them in other instances where they have been taken from individuals.

Q All that you are saying, I take it, is that you have previously seen guns that have a marking on it "INA," is that correct?

MR. EPSTEIN: Objection, your Honor.

A Yes, sir.

THE COURT: Is that right? You have seen other guns with "INA"?

THE WITNESS: Yes, your Honor.

THE COURT: And other guns made in Brazil?

THE WITNESS: Yes.

THE COURT: Have you ever seen "INA" and "Made in

1 rgpd

O'Leary - Cross

99

2 Brazil" on the same gun before?

3 THE WITNESS: The same model of gun?

4 THE COURT: The same weapon like this one.

5 THE WITNESS: Yes.

6 THE COURT: You have seen that before?

7 THE WITNESS: Yes.

8 Q Officer, do you know of your own knowledge where
9 this gun was manufactured?

10 MR. EPSTEIN: Objection, your Honor.

11 THE COURT: I will let him answer if he does
12 know.

13 Do you know?

14 THE WITNESS: I inquired from our --

15 Q No, from your own knowledge.

16 THE COURT: Maybe he has. You have opened it up
17 now.

18 You can answer the question.

19 A I inquired from our Washington, D.C. office and
20 I received documentation from the Bureau headquarters that
21 the subject weapon was manufactured --

22 Q Did you receive any documentation from Brazil?

23 THE COURT: You asked him his knowledge and he
24 is giving you his knowledge.

25 In other words, you got something from Washington

1 rgpd O'Leary - Cross/Redirect 90

2 indicating to you what?

3 THE WITNESS: That this gun was manufactured in
4 Brazil.

5 THE COURT: But you didn't get anything from
6 Brazil?

7 THE WITNESS: No.

8 Q Did you see any documents from Brazil indicating
9 that this gun was manufactured in Brazil?

10 A I personally did not, no.

11 MR. HAFETZ: I object to any testimony from this
12 agent.

13 THE COURT: But you opened the door. You asked
14 him his knowledge and he gave it to you.

15 Okay, any other questions?

16 MR. HAFETZ: No other questions.

17 MR. EPSTEIN: I have one further question.

18 REDIRECT EXAMINATION

19 BY MR. EPSTEIN:

20 Q Mr. O'Leary, were you also informed that the
21 corporation INA is no longer in existence and it's records
22 destroyed?

23 A That is correct.

24 MR. EPSTEIN: No further questions.

25 THE COURT: I take it there are no further questions.

1 rcpd Kingham - Direct

2 Thank you, Mr. O'Leary, you are excused.

3 (Witness excused.)

4 MR. EPSTEIN: Your Honor, my only witness is
5 Mr. Kingham who is available with a telephone call.

6 THE COURT: Why don't you get him down.

7 Do you want to take a short recess for him to come
8 downstairs?

9 MR. EPSTEIN: Yes.

10 (Recess.)

11 T. BARRY KINGHAM, called as a witness
12 on behalf of the Government, being first duly sworn,
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. EPSTEIN:

16 Q How are you employed?

17 A I am an Assistant United States Attorney in the
18 Southern District of New York in the office of Paul J. Curran,
19 the United States Attorney for this district.

20 Q How long have you been so employed?

21 A Approximately a year.

22 Q Mr. Kingham, I direct your attention to October 3,
23 1974. Were you on duty at that time?

24 A I was.

25 Q Where were you on duty?

1 rgnp

Kingham - Direct

92

2 A I was in my office. At that time I believe it
3 was Room 439 here in the courthouse.

4 Q Did there come a time when you conducted an
5 interview of one Marce Bell?

6 A Yes. I believe it was about 12:30 or 12:45 in
7 the afternoon.

8 Q Do you see Mr. Bell in the court today?

9 A I do. He is seated behind you, the gentleman in
10 the plaid sport jacket.

11 MR. EPSTEIN: Your Honor, may the record indicate
12 that identification of the defendant?

13 THE COURT: All right.

14 Q At the outset of the interview what did you say
15 to Mr. Bell and what did he say to you?

16 A As I recall Mr. Bell was brought to my office by
17 Police Officer Frawley, who I believe was part of the New
18 York Joint Task Force, Drug Enforcement Task Force, and
19 Officer Frawley brought Mr. Bell to my office at about 12:45.
20 Mr. Bell sat at a desk in front of me with Police Officer
21 Frawley seated next to him. I then told Mr. Bell that my
22 name was T. Barry Kingham; that I was an Assistant United
23 States Attorney and that meant that I was a lawyer; that I
24 was not his lawyer, that I was a Federal prosecutor; that I
25 worked for the Government and I was like a DA or District

1 rgpd

Kingham - Direct

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2 Attorney and I asked him if he understood. Mr. Bell said
3 yes, he did understand that.

4 I then told him that he had been arrested by
5 Police Officer Frawley for a violation of Federal gun control
6 laws and I believe I cited to him the section which was
7 Section 921 or 922 of Title 18 and told him it related to
8 the receipt of a firearm in interstate commerce.

9 I then asked him if he understood what he had been
10 arrested for and he said yes, he did.

11 I then informed Mr. Bell that he was to be
12 taken shortly before the United States Magistrate in the
13 Courthouse, at which time the Magistrate would set bail in
14 his case and on that charge and I asked him if he understood
15 that and he said he did.

16 At that point I proceeded to read to Mr. Bell from
17 a form which I used for the interview of persons who are to
18 be arraigned and I read to him verbatim certain questions on
19 that form and elicited from him certain answers which I
20 recorded verbatim on the form which I used.

21 Q Mr. Kingham, I now show you what has previously
22 been marked as Government's Exhibit 4 for identification and
23 I ask you if you can identify it.

24 A This is the form that I used in interviewing
25 Mr. Bell on October 8, 1974 at about 12:45 in the afternoon.

1 rgpd Kingham - Direct 24

2 Q Mr. Kingham, is it your practice to employ such
3 forms whenever a defendant is interviewed prior to
4 arraignment?

5 A Yes, it is. I have done it every time in the past
6 year that I have interviewed a defendant before arraignment.
7 I have always used that form and I have used it on that
8 date.

9 MR. EPSTEIN: Your Honor, I offer it.

10 THE COURT: Have you seen this, Mr. Hafetz?

11 MR. HAFETZ: I am going to object to offering
12 the whole form. If Mr. Epstein has some relevant part of
13 it that he wants to show me that he is offering into evidence
14 perhaps he can do that, your Honor, but I am going to object
15 to the whole form coming into evidence.

16 THE COURT: Well, this is one of those things
17 where there is no jury and I think I have seen these forms
18 before. Let me just look at this.

19 I take it, Mr. Kingham, the defendant didn't sign
20 this form, did he?

21 THE WITNESS: No, your Honor. All the handwriting
22 on that form, with the exception of Police Officer Frawley's
23 signature as a witness on the back, is my own.

24 THE COURT: I think for the present time I won't
25 receive it, but I would receive the first page, which has to

1 rgpd

Kingham - Direct

95

2 do with the rights, I think. I will receive the first page
3 and if you want to reserve on it, later on -- I don't know
4 what other questions you are going to ask, maybe I will
5 reconsider it at that time, but that is all I will receive
6 at this time.

7 Q Mr. Kingham, after you read to Mr. Bell the state-
8 ments contained on Page 1 of Government's Exhibit 4 and
9 he responded as you have recorded his responses on Page 1,
10 did there come a time when you asked him about the events
11 leading up to his arrest?

12 A Yes.

13 Q Did he respond to your questions?

14 A He did. Initially I asked Mr. Bell questions
15 concerning certain pedigree information and he gave me the
16 answers to that. I then told him I wanted to ask him about
17 the circumstances surrounding his arrest and I asked him,
18 as I recall, whether or not he had a gun in his possession
19 at the time he was arrested. He told me that he did have
20 a gun at the time he was arrested; that the gun was on his
21 person and that it was loaded. He told me that he had
22 gotten the gun -- as I recall I asked him where he got it
23 and initially he told me "I got it out of the trunk of my
24 car before I was arrested." Then I said "I mean, where
25 did it come from?"

1 rgpd

Kingham - Direct

96

2 As I recall he told me that he had purchased it
3 in Virginia.

4 Q Do you recall anything else?

5 A I do not, Mr. Epstein.

6 MR. EPSTEIN: No further questions.

7 MR. HAFETZ: I didn't hear the last part.

8 THE COURT: He purchased it in Virginia, I think.

9 MR. EPSTEIN: I have no further questions.

10 MR. HAFETZ: I have no questions, your Honor.

11 THE COURT: All right, thank you, Mr. Kingham.

12 (Witness excused.)

13 MR. EPSTEIN: Your Honor, the Government rests.

14 MR. HAFETZ: Your Honor, in regard to the
15 suppression hearing I would like to put the defendant on the
16 stand with the following understanding. The defendant has
17 related to me, as indicated in my affidavit, an entirely
18 different set of events in regard to the search on October
19 7. I have been advised by the Assistant United States
20 Attorney, although I believe that he was communicating the
21 offer in what he may have thought was good faith, that if
22 the defendant did get on the stand and related that set of
23 events he would be prosecuted for perjury. I think in order
24 to get the truth at this hearing I think this is really a
25 threat to keep the defendant off the stand so that we can't

1 rqp d

2 get the true facts on the suppression hearing.

3 THE COURT: Let me see if I can sort this out.
4 Assuming we had a separate suppression motion the defendant
5 could have taken the stand and his testimony would be purely
6 on the motion to suppress I take it, and it would have
7 nothing to do with the charge in the indictment. That is
8 my understanding of what would have happened, isn't that
9 correct?

10 MR. HAFETZ: That's correct, your Honor.

11 THE COURT: I suppose if a defendant takes the
12 stand in a suppression motion under those circumstances
13 he doesn't have to take the stand at the trial, but if he
14 takes the stand at the suppression hearing he is under oath
15 and is bound to tell the truth. I don't know anything
16 about threats, but he is bound to tell the truth, isn't that
17 correct also?

18 MR. HAFETZ: Yes, that's correct, your Honor.
19 However, he has facing against him I believe testimony of
20 agents, contradictory as that might be, which I say the
21 Government may use as a predicate for a perjury prosecution.

22 THE COURT: I have never known a motion where a
23 defendant took the stand where he was not faced with
24 contradictions and that is a problem of credibility which I
25 have to judge, but that does not necessarily mean an indictment

1 rgpd

2 for perjury, but there is an element of credibility and I
3 suppose the finder of facts has to make a decision on the
4 credibility.

5 MR. HAFETZ: That is true, except under the
6 Government's statements here the defendant faces a serious
7 charge here, your Honor. The search and seizure issue is
8 a significant issue in this case. I would like to have the
9 defendant's explanation of events on the stand. I have
10 never been told before that a defendant, if he got on the
11 stand and told the events as he understood them, if they
12 were contradicted by the agents that he would be prosecuted
13 for perjury. I have been told that in this case.

14 THE COURT: I will put it another way. I think
15 you are sort of jumping at conclusions there, but to put it
16 another way if the finder of the facts should believe the
17 defendant then the motion to suppress I take it would be
18 granted and nothing further would happen, isn't that true?

19 MR. HAFETZ: That is correct, your Honor.

20 THE COURT: Nor would there be any prosecution
21 for perjury, I suppose, but on the other hand if on the
22 question of credibility the finder of fact finds that the
23 motion to suppress ought to be denied on the ground that
24 there was probable cause or for some other reason, then the
25 charge at the trial is open, isn't that what happened?

1 rgpd

2 MR. HAFETZ: I didn't hear the last part.

3 THE COURT: Then the finder of facts has got to
4 decide on the basis of the indictment whether the charges
5 have been proved beyond a reasonable doubt, isn't that
6 right?

7 MR. HAFETZ: Yes.

8 THE COURT: I think what I would like to do on
9 this, I don't see any great problem, but I think I will take
10 a lunch break now and ask you to come back at a quarter to
11 2:00 and you talk to your client and see what he wants to
12 do.

13 MR. EPSTEIN: Your Honor, if I could just
14 clarify the record, Mr. Hafetz didn't misrepresent anything.
15 I did tell him like he said, and indeed anyone who takes an
16 oath and ascends the witness stand is vulnerable to perjury
17 and I simply pointed out to him that in my view of the
18 evidence, plus of course on our understanding of what
19 Mr. Bell had told Mr. Kingham --

20 THE COURT: That is a general way to put it.

21 MR. HAFETZ: I think it is a little different
22 twist, your Honor, because we are talking about a Fourth
23 Amendment right where any defendant --

24 THE COURT: He is entitled to it, I am not worried
25 about that, and that would have happened if the motion to

1 rcpd

2 suppress was separate from the trial; he is entitled to take
3 the stand and what he says can't be used in connection with
4 the trial in chief, as I understand it.

5 MR. HAFETZ: Yes, I understand that, your Honor,
6 but I would like to ask that under the circumstances in
7 this case there be a use immunity granted to the defendant
8 for his testimony running only to the suppression hearing.

9 THE COURT: I can't do that. I can't do that,
10 but I will do this. I will recess now until quarter to
11 2:00 and you think about it and talk to your client and
12 decide what you want to do.

13 (Luncheon recess.)

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1 rgpd

2 AFTERNOON SESSION

3 2:45 p.m.

4 MR. EPSTEIN: Your Honor, if I could clarify
5 one thing before we begin. I think that I said to
6 Mr. Hafetz during the conversation he alluded to earlier
7 it was my understanding that his suppression motion was
8 insufficient simply because it contained a hearsay affidavit
9 from him and it was my understanding that to raise a triable
10 issue of fact in a suppression hearing there had to be an
11 affidavit from the defendant and I said it was my assumption
12 either such an affidavit would be submitted at the hearing
13 or that the defendant would take the stand and in either
14 case it was my belief that the account was perjurious.

15 THE COURT: All right, Mr. Hafetz?

16 MR. HAFETZ: Your Honor, the defense rests on the
17 motion to suppress at this time and at the conclusion of
18 the Government's case the defendant moves as well for a
19 judgment of acquittal.

20 THE COURT: I am going to deny your motion for
21 acquittal.

22 MR. HAFETZ: Your Honor, before we get to that,
23 I have several things to say. One is I would like oral
24 argument and also I have a written memorandum of law which I
25 would like to submit to the Court at this time.

1 rgpd

2 THE COURT: You can do all of those things, but
3 as I understand it you are making a motion at the end of
4 the case and I am denying that and I will hear you on the
5 motion to suppress if you want to right now. You may
6 proceed on the motion to suppress.

7 MR. HAFETZ: In regard to the suppression motion,
8 your Honor, I think first under Coolidge against New Hampshire
9 the search was illegal here. The officer had ample oppor-
10 tunity to obtain a search warrant for the defendant's person.
11 The officers had information that the defendant had a gun on
12 him. It is outlined in the affidavit, the same affidavit
13 which served as a predicate for a search warrant for his
14 apartment. They neglected to present to the magistrate
15 an application for a search warrant for his person. The
16 Fourth Amendment commands that if they are intending to make
17 a search, if they have probable cause from a reliable
18 informant, under Coolidge they must make that application
19 for a search warrant. The officers had that information
20 for several days. The officer on the stand testified this
21 morning that the informant was a very reliable informant.
22 As I say, it is the same one that served as the predicate
23 for the search for the apartment. Since they had opportunity
24 of time to secure a warrant and they failed to do so, I sub-
25 mit that under the United States Supreme Court decision in

1 rgpd

2 Coolidge that the search here was illegal.

3 I believe that the motion could rest on that,
4 the motion to suppress, but alternatively I submit that in
5 the event the Court holds that under Coolidge -- or holds
6 to the contrary my argument of the application of Coolidge,
7 I would argue further alternatively that the search was
8 not justifiable under the so-called Terry against Ohio
9 rationale that the Government advances here.

10 THE COURT: I didn't get that, that the
11 Government advances?

12 MR. HAFETZ: The Government advances. As I
13 understand the rationale for a warrant and a search on the
14 street of Mr. Bell, that's justified under the Terry against
15 Ohio doctrine. The Government in its memorandum does not
16 address the Coolidge point. I have difficulty myself
17 understanding how to get around Coolidge, but in any event
18 if Coolidge is deemed inapplicable here I submit the
19 Government argument falling back on Terry still fails.

20 The Terry case states "We merely hold today that
21 where a public officer observes unusual conduct which leads
22 in light of his experience to the belief that criminal
23 activity may be afoot and that the persons with whom he is
24 dealing may be armed and presently dangerous, in the course
25 of investigating this behavior they may conduct a limited

1 rgpd

2 pacdale type of search." I submit that what we have in this
3 case is really -- we don't have the facts, the situation in
4 which Terry is applicable at all. Terry is addressed to
5 the forcible stop on the street type situation where a
6 person's conduct is under investigation. In effect what
7 we have here is agents arriving at an apartment supposedly
8 for the purpose only of executing a search warrant, not for
9 the search of the defendant. What do the agents do when
10 they arrive there? They do not go up to execute that
11 warrant, they wait downstairs for a time ranging anywhere
12 from an hour to an hour and a half outside the defendant's
13 apartment. I submit that this was really a rouse so that
14 they could catch him on the street and apply a Terry type
15 rationale to the defendant. Their purpose there was to
16 go directly to that apartment and execute the search warrant.

17 THE COURT: As I understood the evidence, the
18 reason they did that was fear because the search warrant was
19 to search for contraband in the form of narcotics and as I
20 understand it they made a decision that it would be better
21 to serve the warrant not by going in the apartment for fear
22 that the contraband might be destroyed. Isn't that
23 right?

24 MR. HAFETZ: Your Honor, there was testimony
25 to that effect, but there was also testimony that directly

1 rgpd

2 contradicted the inference the Government would want you to
3 draw from that, namely that their superiors had determined
4 that there was no basis for application for a no-knock
5 search warrant. If the agents really had a basis to believe
6 that there was imminent destruction of narcotics to take
7 place they had the authority to apply for and ask for a
8 no-knock search warrant. They didn't do so based on their
9 superior's determination that they didn't have the basis for
10 that belief, so when they arrived there without no-knock
11 authority they decided to do something which would in effect
12 cause not only the Fourth Amendment intrusion of the apart-
13 ment, but a Fourth Amendment intrusion of the defendant's
14 person and it was not necessary to cause that intrusion of
15 the defendant's person. They deliberately did so by
16 waiting outside until the defendant had left the apartment.
17 Even then after the defendant had left the apartment, what
18 did they do? Did they go to execute the search warrant?
19 They were there for an investigation of the apartment, not
20 of the defendant. Not for a search of the defendant, but
21 to examine the apartment. The defendant was fixing his
22 car preparatory to leaving the scene. The officers could
23 have done several things. Either they could have waited
24 until he left entirely, gone up and executed the warrant,
25 which would have necessitated no intrusion of the defendant's

1 rgpd

2 person, or while the defendant was outside several of the
3 agents could have gone upstairs to execute that search
4 warrant. There is simply no basis under the Terry
5 rationale why they had to force themselves upon the defend-
6 ant. They were not there for an investigative stop or
7 an investigation of the defendant. They were there for
8 a limited purpose, the search of the apartment, and they did
9 not act in accord with that. They broadened the scope and
10 caused an unwarranted intrusion of the defendant's person.

11 I would submit that beyond this the testimony of
12 the agents is in conflict on several material issues, and I
13 won't bother to go over conflicts on all the points,
14 but we will focus on what I believe are the most significant
15 ones.

16 The predicate for Officer or Agent Pazin's frisk of
17 the defendant was his testimony that he observed a bulge on
18 the right side of the defendant's body as the defendant
19 turned towards him. The agent placed Officer Frawley
20 almost right next to him, several feet away was his testimony.
21 There was no testimony of any obstruction of view of why
22 Officer Frawley would not be able to observe that same bulge
23 in the defendant's pocket.

24 The second agent testified the lighting was good
25 and there is simply no reason why a trained, experienced

rgpd

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1 officer such as Frawley, if he is telling the truth, would
2 not have observed that same bulge which would be a predicate
3 for a Terry type search, assuming arguendo that the initial
4 arguments that I made were rejected as to what he would get
5 there to start the Terry type search, but beyond this we have
6 Frawley's testimony which I submit is incredible on its face
7 that here is Frawley really a couple of blocks away from
8 where Agent Pazin is. Pazin is directly across the street
9 from where the defendant is fixing the car. Frawley is on
10 the next block in a car around the corner. The command is
11 given that they should approach the defendant. It takes
12 that much time for Frawley to drive the car around those
13 several blocks, get to the part where the defendant is,
14 come out from his car, walk over and still just be several
15 feet behind Officer Pazin who is directly across the street
16 when the command was given. I submit that the testimony of
17 the officers is really so incredible on material points as
18 to a matter of law to be unbelievable on the significant
19 aspects that the Government must sustain in order to estab-
20 lish the validity of the search here.

21
22 So for these reasons, your Honor, I submit that the
23 search of the defendant was illegal and that the gun that was
24 seized by the officers should be suppressed.

25 THE COURT: Thank you, that is a good argument.

1 rgpd
2 What do you have to say?

3 MR. EPSTEIN: Your Honor, several things.

4 First of all I think Mr. Hafetz is interpreting
5 the scope of Terry and Sibron too narrowly. Terry does
6 not apply only to forcible stops. As I understand Terry,
7 Sibron and Adams against Williams, it applies to any situa-
8 tion where a defendant is stopped by a police officer, is
9 approached by a police officer and the police officer has
10 reason to fear bodily harm, he has reason to fear that the
11 defendant is armed and dangerous.

12 Now, there is no question here, your Honor, that
13 there was nothing improper about the manner in which the
14 agents proceeded. Mr. Hafetz has suggested that this entire
15 affair was a ruse to obtain a gun from Mr. Bell's person.
16 Your Honor, these agents were narcotics agents. They were
17 not ATF agents. They weren't after guns, they were after
18 narcotics. Their principal objective was to get into
19 Mr. Bell's apartment. They have testified, I submit quite
20 plausibly, that the best way is not to apprehend the individ-
21 ual when he is in his apartment. For one thing he could
22 have destroyed the narcotics. For another thing they knew
23 he was armed and they knew he was dangerous.

24 Officer Pazin testified that they knew he had been
25 convicted of manslaughter. Consequently, lacking no-knock

1 rgpd

2 authority would have been extremely dangerous for them to
3 knock on the door, announce their presence and wait to see
4 whether Mr. Bell was going to let them in. That simply
5 isn't the most prudent way to proceed. So assuming that
6 their approach to Mr. Bell was justifiable outside the car,
7 I submit they had two alternatives. They could have gone
8 up to the apartment or they could have approached Mr. Bell
9 and asked permission -- asked if he would let them into the
10 apartment. I submit that there is nothing to be criticized
11 in asking someone's permission to gain entry to the apartment
12 rather than going upstairs and making a forcible entry,
13 which after all would have been the alternative.

14 THE COURT: I think Mr. Hafetz' argument is when they
15 saw the defendant come out and start fixing his tire on the
16 car why didn't the other agents go up and execute the warrant
17 at that point.

18 MR. EPSTEIN: You mean without advising Mr. Bell
19 that they were there?

20 THE COURT: Yes, and on the theory it would have
21 taken some time to fix the tire and they wouldn't have had to
22 approach him at all. What do you think about that?

23 MR. EPSTEIN: I think as I said before they would
24 have had to make a forcible entry in that case, they would
25 have had to break down the door and rummage through the

1 rcpd

2 apartment in a less systematic way than they would have had
3 to do if the defendant were present and I don't think it is
4 an intrusion on the defendant's right to search an apartment
5 in his presence, which is all they sought to do. I think
6 it is worse to conduct the search in his absence than in
7 his presence. I submit that unless Mr. Hafetz can suggest
8 that they approached him in bad faith, and I don't think
9 there is any suggestion of that, that what they did was
10 a permissible exercise of their discretion.

11 Now, in addition it seems to me clear that once
12 Mr. Bell was approached there was authority to frisk him.
13 It was known from the affidavit in support of the search
14 warrant that he had a gun and it was known that he, after
15 all, had been convicted of manslaughter. Consequently,
16 there was very good reason to believe that he was armed
17 and dangerous.

18 I submit that the only discrepancy, if there is
19 one, is the number of feet Mr. Frawley was from Mr. Bell
20 and Mr. Pazin, and I submit that is an immaterial difference.

21 It is interesting, your Honor, furthermore, that
22 Mr. Hafetz raised Coolidge against New Hampshire. Although
23 I haven't read it recently and I don't have a memorandum of
24 his to peruse, it seems to me that Coolidge versus New
25 Hampshire was the most recent substantiation of the plain

1 rgpd
2 view of search and seizure and I would submit that under
3 that theory, which is not one I advanced my memorandum,
4 but which is applicable, the Government was authorized in
5 seizing the gun because it was in plain view. They were
6 both experienced policemen and if you see a bulge in anyone's
7 waistband it doesn't require a great use of the imagination
8 to assume there was a gun there, so I submit that Coolidge
9 against New Hampshire supports our position rather than
10 undermines it.

11 THE COURT: Gentlemen, you have both given me
12 good arguments on this thing. I am going to deny the
13 motion to suppress and, of course, Mr. Hafetz, you have an
14 exception.

15 It seems to me that the taking of the gun here was
16 justified, perhaps under Terry against Ohio, but it almost
17 approaches to me that on the basis of the agent knowing
18 about the defendant or was told that the defendant carried
19 a gun and observing the bulge, I think that is probable
20 cause, that point, and I think in addition to the temporary
21 search just for his protection.

22 I do remember there were some discrepancies in
23 the testimony of the agents, but I don't find those
24 discrepancies such that they change the main story, which
25 was that the defendant was leaning over, standing in the

1 rcpd

2 trunk of the car and that Agent Pazin observed the bulge
3 and removed the gun. I don't think it follows that the
4 other agent had to be staring and should have necessarily
5 seen the bulge. I suppose he was probably more interested
6 in covering Pazin and being sure that nothing happened to
7 him.

8 I don't know why there is any reason -- there may
9 be a discrepancy as to distances, whether it was three feet
10 or whether it was 10 feet, so as far as the point that you
11 raise, and I think it was raised quite properly, that the
12 agent was in a car up on the playground and he drove around
13 the corner, I think he said, and came, but on the other
14 hand I think the testimony was that the defendant came out
15 and stood around his car and there was a flat tire and that
16 he had gotten the tire out and bounced it on the street and
17 he had also gotten himself into the back of the car, I
18 guess, looking for a jack or something -- I suppose all that
19 could have taken some time, so I am going to deny the motion
20 to suppress.

21 How about the trial itself?

22 MR. HAFETZ: Your Honor, the defendant rests at
23 the end of the Government's case and the defendant renews
24 its motion for a judgment of acquittal. I would like to
25 offer also to the Court and to the Government a memorandum

1 rcpd

2 of law on that.

3 THE COURT: I think I would like to do, if you
4 are going to do that, I will consider whether I want a
5 memorandum here. I would like to see the exhibits, I guess
6 I am going to be a juror, and I am going to look at my notes
7 and retire to the robing room. I would like to look at the
8 exhibits and see what I come up with.

9 MR. HAFETZ: May I offer up my memorandum?

10 THE COURT: Yes, indeed. I didn't know you had
11 it. I certainly will take a memorandum.

12 MR. HAFETZ: Your Honor, may the record note I
13 am handing a copy of the memorandum to the Government and
14 the original to the Court.

15 THE COURT: Okay.

16 Let me take a few minutes and look at my notes
17 and see what I can come up with.

18 (Recess.)

19 THE COURT: Gentlemen, I have reviewed my notes
20 regarding the testimony that was received in this trial and
21 on the basis of that I make the following findings of fact:

22 On the evening of October 7, 1974 Agents Frawley,
23 Pazin and others went to the vicinity of 1700 Harrison
24 Avenue, Bronx, for the purpose of executing a search warrant
25 with respect to defendant's apartment in that building,

1 rgpd

2 Apartment No. 253; that the agents waited before going into
3 the apartment and that sometime later, the evidence indicates
4 about an hour later, the defendant came out of the building
5 with a lady companion and went across the street to where
6 was parked an automobile -- I think it was the automobile
7 that was identified in the affidavit supporting the search
8 warrant -- and that the defendant apparently had a flat
9 tire and in the course of trying to repair that he got into
10 the trunk of the car and leaned over and the nearest agent,
11 who was Agent Pazin, observed a bulge underneath the
12 defendant's jacket. Agent Pazin had been informed at that
13 time that the defendant had been carrying a gun several days
14 earlier and had also been informed that defendant had been
15 previously convicted of manslaughter. Agent Pazin put
16 his hands on the side of the defendant when he observed the
17 bulge and removed the gun, which is Exhibit 1, and which
18 was, according to the testimony, fully loaded, the remaining
19 bullets being Exhibit 2A.

20 I find on the basis of the evidence that Agent
21 Pazin could make this search either as a stop-and-frisk
22 search, but indeed almost really that he had probable cause
23 on the basis of what he knew, that the defendant was carrying
24 a gun.

25 So I find as a fact that on the evening of October

1 rcpd

2 7, 1974 the defendant did have in his possession a loaded
3 firearm.

4 Secondly, I find that the defendant's position
5 did affect commerce. The policy stated in the statute,
6 in the following words, "Possession of a firearm by a felon
7 constitutes a burden on commerce or a flood affecting the
8 free flow of commerce." There was certainly evidence
9 that the gun had been in commerce and among the factors are
10 it is stated on the gun that it was made in Brazil. On the
11 screw handle there are some Portuguese abbreviations, "INA.,
12 IAC., GE, ARMAS."

13 There was testimony from Assistant United States
14 Attorney Kingham that the defendant informed him that he had
15 acquired the gun in Virginia, presumably he had brought it
16 to New York and finally the evidence indicates that the car
17 as described to the defendant, and there is no indication
18 it wasn't the defendant's car, was carrying New Jersey license
19 plates.

20 Next I find that at the time of his possession of
21 the gun on October 7, 1974 the defendant had previously
22 been convicted of a felony in the State of New York, and this
23 is Exhibit 3, which is a certain type of copy of a judgment
24 indicating that the defendant pled guilty to manslaughter
25 first degree on March 13, 1967 and was sentenced on October

1 rgpd

2 13, 1967.

3 On the basis of the foregoing, gentlemen, I
4 conclude that the defendant is guilty for violating Title 18
5 appendix section 1202(a).

6 MR. HAFETZ: Your Honor, may I be heard on oral
7 argument on this?

8 THE COURT: No, I have concluded. You can make
9 a motion, of course. You can make a motion to set aside
10 judgment or what you want, but I have concluded as far as
11 the trial is concerned.

12 MR. HAFETZ: I will make that motion if I can be
13 heard. There are some points I want to make.

14 THE COURT: You want to make a motion to set aside
15 my determination, my verdict?

16 MR. HAFETZ: Yes.

17 THE COURT: You can do that.

18 MR. HAFETZ: Can I be heard on that?

19 THE COURT: Oh, yes.

20 MR. HAFETZ: May I inquire first, is it the
21 Court's finding that it is indicated -- there are three
22 aspects of the statute. Is your finding of fact of guilty
23 on one of the three or all of the three?

24 THE COURT: As I read to you just a minute ago,
25 I find him guilty of violating Title 18, Appendix 1202(a).

1 rqpcl

2 That is what he is charged with.

3 MR. HAFETZ: Yes, he is. All three aspects of
4 the section?

5 THE COURT: It doesn't have to be. Any person
6 who has been convicted by a court of the United States of
7 a state of a felony and who possesses in commerce or affect-
8 ing commerce after the date of the enactment of this act any
9 firearm shall be found guilty and so forth. You don't have
10 to go any further than that.

11 MR. HAFETZ: If I may be heard on this motion.
12 With all due respect to the Court, and I say this because
13 it took me some time myself -- it is a very complex statute.

14 THE COURT: Yes. Don't go into that. If you
15 don't like that, you have an exception, of course, and you
16 can appeal it, but I am satisfied on the thing. I think
17 you are building something into it, maybe, more than
18 necessary, but is up to you.

19 MR. HAFETZ: I don't believe so, your Honor.
20 I think the cases are quite clear. If I might just say
21 there is a clear distinction between receipt and possession
22 and the cases are quite clear on receipt that if the gun had
23 traveled any time previously in interstate commerce and the
24 defendant been in some state receives it -- interstate
25 receives it, that is sufficient for receipt, but that is not

1 rqpdl

2 the case here. The receipt was in Virginia so those cases
3 are inadequate.

4 THE COURT: If you listened to me I find him
5 guilty of possession.

6 MR. HAFETZ: Then the cases say the possession
7 must directly be related to commerce.

8 THE COURT: I find that it is and I have given
9 you three reasons for that and if you don't agree with it
10 you have got an appeal, of course. You have got an
11 absolute right of appeal, but there is nothing I can add
12 to it.

13 MR. HAFETZ: I have nothing further.

14 THE COURT: I gave three reasons for the commerce.
15 One was what was on the gun, obviously. The second was the
16 statement that he acquired the gun in Virginia and thirdly
17 that his car was carrying New Jersey plates. Now, I think
18 that is enough to satisfy the statute, but you may on appeal
19 find that it isn't. That is your right.

20 MR. HAFETZ: I have nothing further to add and I
21 believe the cases on possession are quite to the contrary.

22 THE COURT: Okay, that is fair enough. You may
23 find that and good luck to you. That is your prerogative.

24 Okay, now, I would like to fix a date of sentence
25 for Mr. Bell. How about May 12, gentlemen, as a date for

1 rcpd

2 sentencing?

3 MR. HAFETZ: That is certainly fine with us,
4 your Honor.

5 THE COURT: Would that be agreeable to the
6 Government?

7 MR. EPSTEIN: Yes, your Honor.

8 THE COURT: All right, May 12 at 9:30 in the
9 morning and it will be in Room 1505 in this courthouse.

10 I would like to have a pre-sentence report with
11 respect to the defendant and I would be grateful, Mr. Hafetz,
12 if when we adjourn here perhaps you could take Mr. Bell to
13 the probation office so they can start on that.

14 MR. HAFETZ: Yes, I will.

15 THE COURT: Mr. Bell, I would be grateful if you
16 would give them all that you can in support of yourself as
17 well as what is involved here.

18 What is the defendant's bail status?

19 MR. EPSTEIN: Your Honor, the current bail I
20 believe is a \$10,000 personal recognizance bond co-signed
21 by the defendant's brother and secured by \$1500 cash.

22 MR. HAFETZ: I believe that is correct, your
23 Honor.

24 MR. EPSTEIN: Your Honor, we have no objection
25 to that being continued.

1 rcpd

2 THE COURT: All right.

3 Mr. Bell, one other thing, you promise me you will
4 appear for the date of sentence?

5 THE DEFENDANT: Yes, sir, I promise.

6 THE COURT: And any other time you are asked to
7 appear here?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right, I will continue you on your
10 present bail.

11 MR. EPSTEIN: The record should reflect that prior
12 to trial I turned over to Mr. Hafetz, counsel for Mr. Bell,
13 Government's Exhibits 3501 through 3525, is that correct?

14 MR. HAFETZ: Yes.

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WITNESS INDEX

| <u>Name</u> | <u>Direct</u> | <u>Cross</u> | <u>Redirect</u> | <u>Recross</u> |
|-----------------|---------------|--------------|-----------------|----------------|
| William Frawley | 9 | 21 | 55 | |
| Nolan Pazin | 57 | 62 | 82 | |
| John O'Leary | 82 | 86 | | |

EXHIBIT INDEX

| <u>Government</u> | <u>Identification</u> | <u>In Evidence</u> |
|-------------------|-----------------------|--------------------|
| 1 | | 11 |
| 2 | | 16 |
| 2A | | 16 |

In the presence of the attorney for the government
the defendant appeared in person on this date: _____

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired
have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

F. Hafetz

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☐ GUILTY.

Defendant has been convicted as charged of the offense(s) of having been convicted of a felony
knowingly possessing, receiving or transporting in commerce or
transporting commerce a forearm. (Title 18, U.S. Code, App. Section 12)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause
was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The
defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS.

Bail pending appeal fixed at \$10,000 Personal Recognizance Bond to
be cosigned by defendant's wife and to be posted by 4 p.m. on May
1975.

MICROFILM

MAY 23 1975

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation on the
reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation
any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and
probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk
a certified copy of this judgment
and commitment to the U.S.
shall or other qualified officer

COMMITMENT
RECOMMEN-
DATION

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Dudley B. Bonsal

Date

May 19, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

MARCE BELL,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 15th day of July 1975 at 1 St. Andrews Place, N. Y., N. Y.

deponent served the annexed *Affidavit*
Paul J. Curran

upon

the U.S. Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 15th
day of July 19 75

Print name beneath signature

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977